Practice common-placed:

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RULES and CASES

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PRACTICE

IN THE COURTS OF

King's Bench and Common Pleas,

METHODICALLY ARRANGED

IN TWO VOLUMES.

By GEORGE CROMPTON, Esquire, of the INNER TEMPLE.

VOLUME THE FIRST.

LONDON:

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TO THE HONOURABLE

FRANCIS BULLER, Hiquire.

One of the Justices, of his MAJESTY'S Court of King's Bench.

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TO THE HONOURABLE

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FRANCIS BULLER, Esquire.

One of the Justices of his Majesty's Court of King's Bench.

SIR, mon I NEW

Dedicate to you the following production of my early labours, and solicit the favour of your Patronage to the impersect execution of a Design, which, having been approved by you, should have been carried on by abler hands. I do not presume to expect this condescension to the Merits of the Work; but as it has been my ambition to be introduced to the Profession under the sanction of a name so great and respectable as yours, I hope it will be thought I have taken some pains to deserve it.

I WAIT for the judgment of those, who must determine how far my present endeavours have succeeded, before I proceed in the completion of my Plan; if that should be favourable, I shall attribute it to your encouragement, and to the influence of your reputation: but whatever it be, I shall at all times take a pride in acknowledging the Obligations I am under to you, and the grateful sense I have of your favours.

I have the honour to be,

with much effeem,

Your obliged

humble fervant,

GEORGE CROMPTON.

INNER TEMPLE, Oct. 1. 1780.

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INTRODUCTION.

CHAPTER I.

OF the Origin of the Jurisdiction of the Courts.

CHAPTER II.

Of the original Process of the Court of King's Bench.

CHAPTER III.

Of the original Process of the Court of Common Pleas.

CHAPTER IV.

In what Manner the Court of King's Bench obtained Cognizance of civil Actions.

CHAPTER V.

Of the Effoign and Appearance by Attorney.

CHAPTER. VI.

Of putting in Bail to the Action.

CHAPTER VII.

Of the Extension of the Capias to other Actions than those committed vi et armis.

CONTENTS of the INTRODUCTION.

CHAPTER VIII.

Of giving Bail upon the Arrest to the Sheriff.

CHAPTER IX. T VI

Of the Alteration in the Process of the Court of King's Bench.

CHAPTER X.

Of the Alteration in the Process of the Court of Common Pleas.

CHAPTER XI.

Of the old Rules of Court with respect to putting in

LIX RAPTER ON LOUDING AND CONNECCE AND CONNECCE AND

Of the Alteration occasioned in the Process of the Courts on the Stat. 13 Char. 2. Stat. 2. ch. 2.

Of Outlawry.

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courts of King, Pinch and Commin. Plans before them. And lattle, To point out the sions made in VIX "A T T A A H O

Of putting in Special Bail before Commissioners in the

ed of res CHAPTER XV. of we show years

Of affigning the Bail-bond to the Plaintiff.

TW TANDISTRA CHAPTER XVI. beter fini the

Of the Affidavit to hold the Defendant to Bail.

INTRO-

INTRODUCTION.

Of the Alteration in the Process of the Court of King's

CHAPTER THE FIRST.

Of the Origin of the Jurisdiction of the Courts.

In a work calculated to affift the student and attorney in attaining a competent knowledge of the practice of the courts of King's Bench and Common Riess, I flatter myself that some account of the origin of the jurisdiction of those courts, and of the process used therein, will not be unacceptable to the one, or thought useless and unnecessary by the other.

In the few pages I propose to dedicate to this subject, I shall first endeavour to shew the origin of the jurisdiction of the superior courts in Westminster-hall, by taking a chronological view of their formation and establishment.—Secondly, To state the original process adopted by the courts of King's Bench and Common Pleas to bring parties before them.—And, lastly, To point out the several alterations made in such process, together with the occasion of such alterations at different periods of time.

The necessity of understanding well the intent and operation of the original process on which every subsequent proceeding throughout a cause is sounded, will strike every one who is already, or means hereafter to be, of the prosession of the Law. Why one and the same writ should sometimes authorise a subject to deprive another of his personal liberty, at others only serve as a notice to appear to a suit instituted against him por why such a particular writ is adapted to one species of injury, and why it will not afford relief for another, are matters which are apt to consound every Student at his sirst entrance into the profession, and, till he understands them, his attendance on the courts cannot

not but be of little avail. To relieve him, in some measure, from this embarrassment, is the task I shail attempt to discharge, however imperfectly, in this Introduction; the not without suggesting to him, that more information on the subject may be derived from much better writers and more able compilers, who in the course of this treatise I shall have occasion to mention.

oncerned the publick

With regard to the legal polity of the ancient Britons, or that of the various nations that successively broke in upon and destroyed both them and their constitution, we are fo much in the dark, that little can be faid of it with any tolerable certainty. But in the reign of king Alfred, who fucceeded to the monarchy of England, founded by his grandfather Egbert, we are informed the constitution of England was altogether new-modelled, and the whole kingdom reduced under one regular and gradual subordination of government, wherein every man was answerable to his immediate superior for his own conduct, and that of his neighbour's. By his establishment the people were classed in decennaries, confisting of ten families each, who were the pledges and compurgators of each other. Ten of these decennaries made up the larger division of an hundred, and an indefinite number of these hundreds composed the still larger division of a county. Over every class of people presided the most discreet and able amongst them. Those who presided over the county were the alderman, (who, after the Danish invasion and conquest, was denominated the Earl), bishop, theriff, and coroner. Over the hundled, the lord; and over every tything, prefided the tythingman, or borsholder. In the few miserable towns in which there was any trade, the people were in all probability under some species of corporate government, the nature of which we are little informed of. Writers, describing the progress of society, apprehend that some such government existed in them; but say, that it was under abfurd regulations, and built on oppressive notions, tending rather to curb than affift the spirit of industry and commerce. And fo well indeed are they convinced of this fact, that they affign it as one of the principal causes that prevented towns in England, as well as in other parts of Europe, from emerging out of the despicable state they continued in till the dawn of the fifteenth century.

The laws at this time were few and fimple, made at the general affembly of the state when convened by the sovereign, and promulged to the people by the Earls and Sheriffs in their perambu-

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perambulations through their Teveral counties, in order to array and class the people within them. 4 Matters of debt and contract were tufually adjusted in the decenvaries - but the principal causes came into the great county court, held by the theriffs affifted by the Bilhop and Earl, which had cognizance of three feveral matters .- First, Of offences against religion. - Secondly, Of temporal offences which concerned the publick, as felonies, breaches of the peace, nuisances, and the like .- Thirdly, Of civil actions, as titles to land, and fuits upon debt or contract; and which, besides held the view of frankpledge: which was an inquest impannelled by the sheriff, to see that every one above the age of twelve years had entered into some tything and taken the oath of allegiance. From the time of king Edgar, this great county court was divided into two, - the one a criminal. the other a rivil court .- The criminal was called the fheriff's tourn from which was derived the hundred court and court-leet], which was a court held bythe Sheriff and Bishop twice in the year, in the months following Bafter and Michaelmas, for the purpole of trying all criminal matters whatever .- The civil court retained the name of the county court from which came the court-baron , and in it all the civil pleas of confequence arising in the county were discussed and decided. In the criminal court offences were enquired of by an inquest impannelled, and offenders were punished according to the superstition of the times, if they did not purge themselves of the matter wherewith they were charged by the ordeal, by the corfned or morfel of execuation, or by wager of law with compurgators .- In the civil court, parties complained against might purge themselves by their sureties. Trial by jury was also frequently used; for that mode of trial is undoubtedly of Saxon original; though whether such jury was composed only of twelve men, or whether they were bound to a firict unanimity, is not precisely known at this distance of time. It meds the betters them revos heart and

By the establishment of these tribunals, the people were not drawn away from their domestic avocations, to attend their causes at a great distance from home; due order was observed throughout the kingdom, the publick peace secured, and justice done to every one in an easy and expeditious manner by the intervention and suffrages of his neighbours. But in case a party conceived himself to be aggrieved by the judgment, or if tavour or affection were shewn at the trial of the cause, there lay an appeal to the king in his supreme court, or general assembly of the state,

called the * Wittena-gemote; which was convened annually, or oftner where the fovereign pleased, to consult on publick business, to try great offenders, and which, in thous, had a supreme and universal jurisdiction. To this supreme court, as the nation emerged from its state of barbarity, and civilin zation put men on different pursuits, whereby litigations encreased, appeals became frequent; it often happening, that in the inferior courts matters were either partially confidered or not well understood. So that the intervention of the Wittena-gemote, to fettle the various claims and pretentions to property, and reconcile differences, became necessary in almost every case. But, notwithstanding the exercise of this appellate jurisdiction, must have taken up a considerable share of the time allotted for the fitting of this great assembly, it does not appear that there was any other tribunal erected for the hearing and investigation of appeals from the inferior courts. For though the Anglo-Saxon constitution received many severe shocks from the irruptions of the Danes and

^{*} I forbear to mention of what perfons this court was composed, as our greatest writers have differed on the subject.-Perhaps their prejudices and party views have not a little obscured it. Mr Lambard in his Archeion says, that to this court were summoned the earls of each county, and the lords of each leet, and likewise the reprefentatives of the towns, chosen by the burgesses. But this idea of the ancient Wittena-gemote is apparently erroneous, as it is pretty clear the constitution was not so accurately defined at that early period, particularly as there are no traces to be found of a representative body ever fitting in the great council of the realm, during the time of the Saxons. Sir Edward Coke feems to have fallen into the same error, in faying, that the tenants in ancient demesne samongst the privileges they claimed before the conquest] had that of not contributing to the wages of knights of the shire; and Sir Robert Atkyns, and others, have followed that great lawyer in the same error, conceiving and wishing to maintain that a representative body was convened during the Anglo-Saxon conflitution; while other writers have maintained a contrary opinion. Mr Hume, in his first appendix, has with great ability and ingenuity handled the subject, and fays, that it is univerfally agreed, that the aldermen, prelates, and earls, were a component part of the Wittena-gemete, and that the only difpute is about the cuites or wisemen, who, the monarchical party maintain, were the judges, or men learned in the law; whereas the popular party affert, that they were the representatives of the Burghs, or what we now call the Commons. He examines the grounds of both these hypotheses with candour, and in a manner that will entertain the fludent. See also, 1 Black. Com. p. 149 -Brady on boroughs, and contra lord Lyttletons, Henry the second. other

other nations, and many new laws and cultoms were introduced by the lever I invaders; yet to execute in was the outline of the government, as their head by the matterly hand of king Afred, that through the various revolutions, neither the provincial not judicial polity of it were discontinued or materially altered. It is certain however, that the whole race of our Saxon Princes, on their accession to the throne, with the advice of their great council, made such alterations in the laws as the exigencies of the times seemed to require.

But when the Conqueror, by the decifive advantage he gained over Harold at Haftings, had got possession of the crown, put in force the old Saxon law, by which the estates of all perfons were forfeited, who were found in arms in opposition to their fovereign. The feveral estates of such subjects, which the conqueror by this law became intitled to, and accordingly feized, he divided amongst his followers and favourites, to hold of him by the like military and feudal fervices which prevailed almost universally in his native duchy of Normandy; the nature of which was hardly known here before his arrival. This new establishment involving in it a variety of prerogatives and duties, due from fuch tenants to the King, necessarily introduced a great alteration in the constitution of the kingdom. The remedies for the recovery of these duties, and the consequences of neglecting them, together with the appendages of fuch tenures, became the most material and intricate learning in the law: By far too intricate for the understandings of the suitors in the county-courts and courts-baron; and which, for that reason, came usually to be discussed in the sovereign eyre of the king. The subsequent treasons too, of such of his English subjects as were permitted to retain their ancient polletions, had fo much increased the conquerors ability during the first thirteen years of his reign, to enlarge the number of these grants with feudal refervations; that he at length took occasion, in a general meeting of the realm, to introduce universally that fystem of laws, which at first had only a partial reception amongst his followers from Normandy. The grand principle of this system was, that all lands were held mediately or immediately of the King, by the fervices in the grants thereof respectively, referved i bearand non-sophing and

Upon this universal establishment of the feudal system in England, all the intricacies and refinements, which distin-

guished it on the continent, were imported here by the Norman justicies; and, as the fuitors and judges in the inferior courts were unable to decide the law on the subject, it became necessary to apply in almost every case to the supreme council of the Crown. This immediate refort of litigants to the supreme council for justice was still further encreased, by a diffinction introduced foon after the conquest, between courts of record and not of record. For by an edict of the Conqueror's it was ordained that all proceedings in the king's courts should be carried on in the Norman, instead of the English language. By this edict the remedial influence of the county courts, and other inferior jurisdictions, were very much narrowed. For as the judges and fuitors of fuch courts were incapable of understanding that language, they were prohibited from recording their acts; fo that the discussion of all matters of importance ceased in the great Saxon seats, of justice, and an original jurisdiction over all kinds of causes was given to the supreme court where the king presided in person. The dignity and importance of the county courts was also further impaired by the secession of the Bishops, and the separation which took place in consequence of their fecession between the civil and ecclesiastical courts. Earls too thortly afterwards neglected to attend them; from which time their confequence has been gradually declining, and though there remains a shadow of them to this day, it is but a shadow of their pristine splendour and dignity.

The clergy had been for some time endeavouring, all over Europe, to exempt themselves from the secular power, and when the Conqueror came in, as they had all along feconded his views, he thought it most prudent to comply with their demands. He therefore granted them several immunities, and amongst the rest he permitted the Bishops to establish courts in their feveral dioceses, in which they assumed a jurifdiction over the inferior clergy and all their dependents, who were to have justice dispensed to them in the consistorial court by the bishop or his substitute. The erection of these courts for the future investigation of ecclesiastical matters, with which the fecular judges were no longer to interfere, not only deprived the county courts of a great number of causes, and attendance of fo many fuitors, but also of the affistance and veneration they derived from the learning and ability of the Prelates. And though the disputes which afterwards arose between the Bishops themselves, and such of the clergy as were able to cope with them, called for the necessity of a jurisdiction somewhere, yet their litigations usually came into the Sovereign Eyre. For however willing in those days

they might have been to appeal to the supreme Pontiff for juffice, they were nevertheless glad to have it administred at home by the king's court, held before himself in person at the time of his parliaments; which were usually assembled where he kept the three great festivals of Christmas, Easter and Whit funtide.

The priginal as well as appellate jurisdiction, exercised by the fupreme council when convened, * in like manner as by the Wittenagemote in the Saxon times, drew into it the final determination of all causes of consequence, whether of ecclesiastical, civil, or criminal conusance. So extensive a jurisdiction, interfering with the discussion of matters of state, occasioned the members thereof, when convened, to fit for a long time together. But the conqueror finding thefe long fessions inconvenient, and apprehending danger from fo large a meeting of his Chief Vassals, under the pretext of eafing the subject by erecting a constant court for the trial of causes and determination of appeals, took an opportunity to separate the judicial power of the members of this assembly, from their deliberative as counsellors to the crown. In this new court erected in his own palace, and thence called by Bracton, Aula Regia, sate with other chief vassals, the first officers of state, the Chancellor, earl Mareschal, Chamberlain, Seneschal, and Treasurer, over all of whom presided a special and new appointed Magistrate, next in authority to the king himself, called Capitalis Justiciarius totius Anglia.

This new erected court by the constitution of it was ambulatory, and followed the Sovereign whenever he changed his place of abode. In the county where it happened to be, it had an original jurisdiction of all matters arising therein whether of a civil or criminal nature, -but of causes ariting in other counties it only exercised an appellate jurisdiction. And to give this capital Justiciary a more extensive authority, and to lessen still further the remaining influence of the county courts, it was ordained by the Conqueror that from thenceforth all causes of action, amounting to forty shillings and upwards, should be determined by the king's writ, which was usually made returnable in the Aula Regis; but in some cases they were made out to give the sheriff authority to proceed in the fuit, and then they were called Vicontiel. Vicontiel writs were of two forts, the one founded on Torts, the other

as were able to cope with them, called for the necessity of a -di omas yl * Vide Spel. Glof. verbo Parliamentum. noisibling as the Sovereign Eyre. For however willing in those days.

con Controlled The vicinties write adapted for Florits divere those of Trespassing Replegiaris facios, mustanes; and others of the like nature is and those for matters of contract were called writes of + justicies, which was a command to the sheriff to do justice between the parties in that particular cause of four this debte or demand exceeded forty shillings, the sheriff was no longer empowered to hold plea thereof by a plaint levied in court as in the Saxon times. So also the write of right, affued to enable the lord to hold plea of land within his juridiction. For the maxim introduced by the Norman justiciars was that no one could hold lands without the king's patent; not plea of forty shillings without the king's arriteging to the sor

Though it not be

feizure of their lands, without applying to any court for re-Though these great Officers at the establishment of the Aula Regis fate together in court, as well to try the civil and criminal matters referred to their judgment, as to receive and fettle the revenue, yet our legal antiquarians think, that even at this period of time, each of them had a peculiar office and jurisdiction assigned him. The Chancellor, it is supposed, as being the king's chaplain and confessor, more immediately prefided when the complaint was of some oppressive act of the fovereign-The Treasurer, when the nevenues and rents were to be received from the theriffs, and the fines and ammerciaments from the escheators, and on passing the public accounts-The Constable and I Mareichal, upon the discussion of matters of honour, and war, and the rights of foreignersthe Seneschal, when the dispute arose within the limits of the royal residence-and the Chamberlain, when the money was to be told in and paid out of the Treasury. The awarden

[†] Though a justicies, Replegiari facias, and other vicontiel writs may be had of course at this day, and if improperly issued, the party has no redress but by supersedeas quia improvide emanavit; yet it is not improbable but that, at the commencement of the Norman period, before the extent of the repnedy given, by the various writs of accedas ad curiam, recordari facias loquelam, salse judgment, &c. were fully established, the Chancellor exercised a discretion in allowing these writs, and only permitted them to go in those cases where the policy of reducing the county court was not necessary to be regarded. Vide of superseding writs. 1 Eq. Abr. 415, and title Writs in the abridgements.

[‡] In our old books there is great confusion with respect to the number and duty of the Marshals. Vide Mr Madox, from page 31 to 33. Lord Coke stiles the marshal who presided with the constable, the Earl Marshal of England, by way of pre-eminence. 4 Instit. 123. Co. Lit. 74.

The Conqueror, like his predecessors, had his royal table fupported by the tenants of his ancient demesnes, whose annual renders of, corn, sheep, wien, and other produce of their lands were brought to the place of his residence. And that the fame might be paid with more punctuality and convenience to the respective tenants, the Sovereign frequently changed his place of abode. But Henry the first generally commuted these renders into certain fixed sums, after whose reign, the removal of the king's household being no longer necessary, we find it to have been less frequent. The Sovereign's remedy against these tenants in ancient demesne, upon neglect to discharge their bounden renders, was by entry and feizure of their lands, without applying to any court for redress, or taking out any process against them. And if such entry and feizure were improperly made, the tenant's only remedy was by petition to the king's bailiff, the steward of the court of ancient demesne, who heard and finally determined the matter; fo that, no other court interfered between the king and his tenants, with regard to these renders &.

Our greatest legal Antiquarians have so long and so widely differed, concerning the other chief vaffals of the crown previous to the conquest, whether they were military tenants, focage tenants, or whether they were tenants at all, but merely allodial possessors, [allodarii] that it would be unbecoming in me to interfere with their discussions. But certain it is, and indeed agreed by them all, that the flavish fervices, the perpetual concomitants of our old tenures, were unknown in this country till introduced by the Norman justiciars shortly after the Conquest. At which time the establishment of the feudal burthens of escheat, fines for alienation, primer-feifins, aids, wardship, marriage and relief, with their numberless appendages, multiplied the pretentions of the crown to some claim or other, on every alteration in the family or domeftic concerns of the Tenants. These claims and pretentions, and disputes in consequence of them, were at first heard and adjusted with all other matters of importance in the court where the Chief Justiciar presided. But as the revenues thereby derived were very confiderable, and tolerably well paid to the receivors in the country, it was found necessary that their accounts should undergo a closer inspection and revision than could possibly be given them in the

[§] Vide Brac. lib. 1. c. 11. who in describing these tenants says, "quod a gleba amoveri non poterint, quamdiu solvere possunt debitas pensiones."

supreme court; whose attention was wholly engrossed by the multifarious matters referred to it. The Conqueror therefore appointed a felect committee, of whom the Treafurer was the chief, to fit apart from the supreme court, in a chamber of his palace, particularly to audit these accounts, and compel the payment of those dues he laid claim to. This court was built on the model of one erected for the like purpose in his own native duchy. It assumed the name of the king's Scaccarium or Exchequer, and the same authority was delegated to its judges, as was exercised by the masters of the Exchequer in Normandy, This new court on its establishment Arripped the Chief Jufliciar, in the very zenith of his power, of a material branch of his jurisdiction; though it appears that this powerful magistrate for some time afterwards continued to interfere in the Exchequer. For in dialogue de Scaccario, lib. 1. c. 9. speaking of this officer, it is said "he was great in the Exchequer, as well as in the court—fo that nothing of moment was or could be done there, without his confent or advice." However this first deprivation of the Chief Jufficiar's authority, who on his appointment was inveffed with powers fo large and boundlefs, that he became both a tyrant to the People, and formidable to the Crown itfelf, certainly arose from mere necessity, and not from the jealoufy either of the fovereign or his people, to which the subsequent diminutions of it are properly attributed.

In this court of Exchequer were all matters relating to the revenue hereafter to be determined; fo that when any patent or royal grant was fealed by the Chancellor, the fame was effreated into this court, and execution went forth for the refervations therein contained to the Crown. So all original writs from the Chancellor, giving other courts a jurisdiction to hear and determine causes between the people, gave the court of Exchequer a power to collect the fines and amerciaments due to the King, in the progress and investigation of those causes imposed on the parties. And when the great court inflicted fines on criminal offenders, the records were estreated into the Exchequer, from whence issued a process to get in the same, or if they had been paid to the clerk be was made to account for them there. In this court too, all the Seriffs, Coroners, Escheators and other officers, employed in receiving the revenue, were to make up and pass their ac-counts. With jurisdiction over such matters, this court continued till the reign of Edward the First, who is supposed to have formed it in the manner we find it at this day; confifting of two divisions, the receipt of the Exchequer, and the court or judicial part of it, which hears causes relating thereto.

thereto. And it has long fince been both a court of Equity and common law, and holds plea of matters not at all relating to the revenue, ariling between subject and subject.

The process used on the common law side of the court of Exchaquer may be seen in a variety of tracks, and does not properly come within the subject of this Introduction, in which I only proposed to point out the intent and operation of the process of the courts of King's Bench and Common Pleas; to do which, in a satisfactory manner, it was necessary to treat slightly of the jurisdiction of the Anla Regis, instituted by the Norman Invader, and to shew what share of that jurisdiction our several courts of justice at this hour respectively exercise.

From what has been faid of the origin of the Exchequer, it certainly strikes the student as something remarkable that there exists in it a court of equity, as well as a court of law-The precise time when the court of Exchequer first assumed an equitable jurisdiction, or from what cause it originated, is not well afcertained. But we may well suppose, that when it was found necessary, in order to effectuate justice, to propound articles to compel persons to answer upon oath. to allegations therein contained between subjects in civil suits, and which articles were made to the King, and by him generally referred to his chancellor, the officer of the crown (in later times called the Attorney General) was induced to exhibit like articles in the Exchequer for the difcovery of facts relating to the revenue. From hence arole informations for treasure-treve, and for the discovery of the forfeited goods of an outlaw filed in the Exchequer *. And when afterwards this court, by the exposition they put on the statute of Rutland +, by which it is enacted, " That no " fuit shall be prosecuted in the Exchequer, unless it conthe evident meaning of the legislature, that pleas between subjects who were debters to the crown, came within the idea of ministers of the Exchequer, this court upheld a jurisdiction as well of matters inquirable by exhibited articles, as of matters cognizable in actions at common law. And though the subpæna was not invented in Chancery till the reign of Edward the third, they certainly before that time exercised both an equitable jurisdiction on exhibited articles, and in actions at common law, whenever the com-

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^{*} Hard, 22.

^{+ 10} Edward the first.

plainant suggested that he was a debtor or fermor to the king. It feems too, that before the fubpena was invented, the process they used was a venire, attachment and commission of rebellion, the process usually awarded in the Aula Registion of great and particular occasions. But when Richard de Waltham had devised the subpæna returnable in Chancery, the treasurer of the Exchequer, in imitation of its framed a fimilar writ for matters of equity, under the feal of his own court, returnable before himfelf, instead of using the process of the wenire in the first instance; retaining, however, that and its following process, in case the party should shew any contumacy to his subpana. The exchequer writ of subpana was also afterwards extended as an original process in a civil action commenced there, though how long before the reign of Henry the eighth is not well known. And this writ, together with the venire ad respondendum, and writ of quo minus, which came into use in civil actions between subject and subject in consequence of the above exposition of the statute of Rutland, are the three methods at this day of commencing civil actions in the court of Exchequer. But to return to the remaining jurisdiction of the Chief jufficiary.

The Aula Regis, wherein this magistrate presided, had fill an original jurisdiction over all causes of moment not immediately concerning the revenue, cognizance of all criminal offences committed in the county where it happened to be, the punishment of all capital delinquents, and an appellate jurifdiction from every inferior common law court in the kingdom. It was not long, however, before the authority which this magistrate enjoyed received another considerable shock. For as it was the duty of the Chief Justiciar, as well as the rest who composed the Aula Regis, to attend their fovereign, and be at hand to advise him in all matters of law and frate, the people who had causes depending complained loudly of the inconvenience they fuffered in being necessitated to follow the King's suite from place to place to have them determined. A restoration of the ancient constitution, and particularly of the power of the county court, the grand feat of justice in the Saxon times, whereof they had been unjustly deprived, partly by the policy, and partly by the force of the Normans, was now much wished for by the people. And though the dignity of the county court was not only greatly diminished, but the matters usually disputed were become too intricate for the understandings of the fuitors, yet, from the intolerable expence and delay occasioned by following the supreme tribunal, travelling about with the King's person, the chance of injustice seemed preferable

preferable to procraftination of Invite reign of Rufus othering Congueror Fon and fuccellor, it was found expedient to pare off Come of the excrefeences of the Norman regulations, by resturing in certain cases the laws of Edward the Confeffor. The outline of the new conflictution, howevery was fuffered to remain as in his father's time. In the reign of Henry the first some little afteration, with respect to the trial of caufes in a more eafy and expeditious manner for thent fubreen took place for a while. And in the following reign of Stephen the usurper, though much was promifed, little o was performed towards redreffing the numberless grievances of the people. But in the time of Henry the fecond the laws on were revised and methodized, and reduced into a regular order. And to obviate the inconveniences of following the fupreme court, this Prince, at the parliament of Northampton, at established certain officers, called Justices in Eyre, justiciarii itinerantes; I fay, established fuch justices, contrary to the old chronicles, which maintain that this prince first introduced them. For Mr. Madox * gives inftances upon record of fuch justices going their circuits, so early as the eighteenth year of king Henry the first. And I follow his opinion in preference to that of the monkish writers, in consequence of lord Coke's advice, not to mind chronicle law, when put in competition with records. Besides, lord Lyttelton seems inclined to think that fuch justices were first appointed in this island by king Henry the first, that prince observing the great behefits derived to the people in France from a fimilar infli-or tution of Louis le Gros; but fays, that during the intestine commotions under Stephen they had been disused, and were therefore only revived and regularly fettled by king Henry l'oras it wa the fecond. weil as the reft who composed the Aula Regis to attend the

These new created judges at first went their circuits frequently, but were soon prohibited from going them oftener than once in seven years. This prohibition was probably owing to the jealousy of the barons, whose independent and hereditary jurisdictions were much infringed by this regular exercise of power derived from the immediate authority of the sovereign. It was not long, however, before the barons, finding it necessary, in order to support their pretensions against the crown, to make some regulations in favour of the commons, stifled the jealousy they had formerly conceived against the Justices in Eyre, and expressly stipulated with their sovereign that they should be

about with the king's perfect. e. g. see king the hindred

fent into every county once in the year to try certain actions, then called Recognitions or Affizes + .- Affizes were remedies which had been introduced at the fame parliament of Northampton, for the purpose of trying titles to land in a more certain and expeditious manner before commissioners appointed by the crown, than before the fuitors in the County court, or the King's justiciars in the Aula Regis. The invention of this mode of trial, as well as that of the grand affize, or trial by a special kind of jury in a writ of Right, at the option of the tenant or demandant, instead of the Norman trial by battel, are attributed to Glanvil, Chief Justiciar to King Henry the second.

These Justices in Eyre, besides being impowered to take the affizes, were commissioned also by the King, or the guardians of the realm in his absence, to do justice of all kinds in their respective circuits, where the property in con-tention did not amount to half a knight's see, or where the controverly was of that importance that it could not be determined but in the fovereign's presence. And if a matter of difficulty arose in taking the assize, these judges were afterwards directed to adjourn it, and cause it to be brought before the justices of the bench *. These itinerant magistrates were also charged to make inquisitions concerning robbers and malefactors in the counties through which they passed, and to take especial care of the rights and profits accruing to the crown from the refervations in the feudal grants. And at their first institution they were directed to enquire of feveral matters which the preceding commotions had made necessary +.

Wherever these justices came they superseded the tourn, and all matters civil and criminal were referred to their judgments; but still an appeal lay from their determination to the great Aula Regis. And if the King went into the county where they happened to be fitting, all pleas before them immediately ceased, and came into the sovereign eyre before the Chief Justiciar.

In their circuits these Justices in Eyre acted also as auxiliaries to the supreme court; for whenever any matter of

ins not only occasioned delay, fi

cause being frequently obliged to be ad 11:5 (Barta share).

Wide magna charta, c. 12. " short gaird or cleson gaintawa

Vide lord Lyttelion, B. 4. Jub anno 1176, and the records cited from Madox in his appendix, No. 1300 200 200 11 bebugt riedgement of a debt in court, atteiled by the court itsel

fact was strongly litigated by the contending parties above, and which arole at a great distance from the Aula Regis, there iffued a writ, directed to the chief justice in eyre, to inquite into the fact I. From this circumstance we may perhaps look for the origin of the practice in the court of chancery of directing a feigned iffue in law to try a fact strongly controverted between the parties in a furt there. Nor is it improbable but that the legislature at Edward the first's second parliament at Westminster took the hint from the like usage. to ordain, that pleas depending in either bench that required an easy examination should be tried in the county wherein the facts arose, before the justices appointed to take the affizes, by virtue of the writ given by that statute; from which has arisen the very beneficial jurisdictor of the affices, were commissioned a auxiliary courts of nisi prius, dians of the realmanthis ab

Upon receiving a plea, if it was a matter of fact, a jury was impannelled by the theriff, who gave in their verdict to the Juffice in Eyre, which was afterwards fent to the Aula Regis to be recorded. In debt upon simple contract, the defendant charged therewith might wage his law as in the Saxon times. But wager of law was never permitted, unless the defendant bore a fair and irreproachable character; and it was also confined to fuch cases where a debt might be fuppoled to be discharged, or fatisfaction have been made in private without any witheffes to atteft it; as in actions of debt on simple contract, or for an amercement in a court baron, in actions of detinue, account, and on parol fubmissions to an award. For on all these occasions the action is built on a feeble foundation, and the law prefumes that the party might either have discharged the debt in secret, or before witnesses that are dead or not to be found. In actions on specialty debts, withelles were produced to attest the truth of the deed *. In pleas of land, the investigate thereof county where they happened to be itting, all pleas before

Vide Riley's Plead. in Parl. 74, 75. In those days a great difficulty attended the proving of a deed. For, according to lord Coke, they anciently added the names of the witnesses in the contents of the deed, after the clause of " in cujus rei memoriam," and impannelled them with the jury. This not only occasioned delay, from the necessity there was of awarding process to bring these witnesses in, but also from the cause being frequently obliged to be adjourned for their default. But to prevent this delay, and fave the trouble and expence which attended it, recognizances were introduced; which being an ac-

thereof, figned by the pares curia, was produced to the become; but if that could not be found, the parties joined willie by battel, till that barbarous and abfurd mode of stial fell into diffuse, and the grand affize was introduced in its room. Criminal matters and offences were enquited of by an inquest impannelled, and presented on articles of inquiry, as in the Saxon times. But now the custom of putting the comparty accused to purge himselby the ordeal; for in lesser of a petit jury was introduced, to hear the evidence of the fact wherewith he was charged. So that, the prisoner did not, as informerly, produce his witnesses to the first jury, who now wonly heard evidence to accuse, but reserved his desence for the second jury, before whom he was to be tried, or because

-har when the fustices in Eyre returned from their circuits, they lodged the records in the Exchequer, from whence issued to process to collect and gather in the fines and americaments to due to the crown; But when the division of the courts to took place, in the reign of Edward the first, the records never deposited in their respective treasuries, and only expective thereof, so far as related to the revenue, were made that the first thereof, so far as related to the revenue, were made that it gathered to the Exchequer.

The Justices in Eyre having only a delegated power from the crown to hear and determine the causes referred to them, and a writ of error and appeal lay from their judgment to the -19 Tupreme court where the Chief Jufticiar prefided. This right -noof appeal brought back to that powerful magistrate the final determination of almost all causes of consequence, and occasioned not only a great delay of justice, but a considerable encrease of expence to the parties. So great an influx to of business to the supreme court neither affording them ""leifure to hear, nor opportunity to dispatch the causes referred to them with expedition and punctuality, foon occasioned 300 a boud cry for the establishment of another jurisdiction, for the fole investigation of civil disputes. And as by this time the extravagant powers affumed by the Chief Jufliciar had kindled a jealoufy in the crown, and fometimes filled the nation with just alarms for its privileges, a diminution of his authority was in the contemplation both of the King and face to his eighth report, feems inclined to believeled aif mon Pleas was not only a diffindt court at the time of magna

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From the first appointment of this officer by the Conqueror, be his powers motwithflanding parts of his jurifdiction had lei been branched out into other channels, from various circumfrances, had been continually encreasing. But Mr Madox thinks, that this encrease of authority was rather owing to 25 the personal dignity and confequence of those who had been of fuccessively appointed to the office, than to the extent of 15 the jurifdiction allotted do its In this, perhaps, she is not militaken for we find it to have been generally held by fome Begreat prelate or powerful baron. And it appears that all the great officers of the Auta Regis were usually filled with the "first personages in the kingdom; it being observed by our ancient writers, that the splendour of the king's court appeared much in the greatness of his ministers; but that some were fo great in themselves, that they diminished the granand deur of their mafter, and, by attracting the eyes of the multitude, made the King offen entertain wishes to diminish 21 that luftre, which so much exceeded his own. The frequent attempts of our princes to letten the power and authority of the magnates regni, is very conspicuous in the subdivision of. the great Feifs, which on escheats and forfeitures had been made; but which practice was foon put a stop to by the statute de donis. * However not before some of them had received great checks in acquiring and perpetuating in their own families their extensive possessions,

the crown to hear and determine the cautes referred to the The diminution of the jurifdiction and authority of the Chief Justiciar, the object of our present attention, must certainly have been an effential part of the policy of the descendants of Henry the fecond. But perhaps it was owing more to the assumed consequence and importance of the then Chief Justiciar, than to any thing elfe, that this great office received the most severe blow to its authority during the reign of one of them: I mean by the erection of the court of Common Please which I am led to think was first separated from the Aula Regis in the time of Richard the first, though it was not confirmed and made stationary at Westminster till the seventeenth year of King John. In this opinion I follow Mr. Madox, although it must be acknowledged that he differs from the authority of most writers on this subject, and amongst others of lord Coke, who in Coke Lyttleton, 71 b. and in the preface to his eighth report, feems inclined to believe that the Common Pleas was not only a distinct court at the time of magne charta, but that there was a court of fuch peculiar and fepa-

^{*} Westminster the second, 13 Edw. 1.

rate jurisdiction even before the conquest. in Londs Cole as a lawyer, no doubt, metits our greatest reverence; but Mindure as an antiquary, is certainly deferving of our attentions and particularly in a matter of this fort; in which we can not but suppose his researches to have been higher than those of his lordship. According to the antiquary, then, for some time after the conquest, there was (as I have faid before) but one great and supreme court, called the Aula Regist exercifing a jurisdiction over civil and criminal matters from which gradually forung the courts of Exchequer and Common Pleas, and as the former became altogether independent, for the latter became wholly distinct from it. He thinks too, that the separation of the Common Pleas took place in the reign of Richard the first, though it was not (as he * fays) firmly established till that of Henry the third. In this opinion the antiquary feems to be confirmed by fome remarkable pafa fages in the history of that reign, in which he lays the foundation of the Common Pleas, one of which in particular I shall advert to no noise they and and and of the office

a toor capals and archition then, more Amongst the various schemes put in practice by Richard the first, to get money to support his projects against the infidels, he forgot the policy which it was clearly his interest to purfue; and, while he was intent only on getting money, neglected altogether the rights of his crown, and the welfare of his people. For we are informed, that he put up all the highest offices and titles to fale, and, amongst the rest, fold that of Chief Justiciary to Hugh de Puzas, bishop of Dura ham, for one thousand marks; which prelate was also rich enough to buy the earldom of Northumberland. When Richard afterwards let out on the knight errantry of a Croifade, he entrusted the guardianship of the realm to this Hugh de Puzas, jointly with his favourite Hugh de Longchamp, who held the bishoprick of Ely, the office of chancellor, and who was allo the Pope's legate. Whether Puzas conceived as he had bought the office of Chief Justiciary, it was an infringement on the rights of his purchase to put another in commission with himself in the Viceroyship of the kingdom; or whether it was owing to the jealoufy or ambition of Longchamp, it is certain, that the instant the King was gone on his project, these joint guardians, from their quarrels, threw the whole kingdom into a flame. In their contentions Longchamp got the better of Puzas, and not only compelled him to relign all his offices, but usurped that of justiciar his court for the investig

are of the people flould be fully established. With this

himself.) and lent Punas to prifor Richard's time was fo much taken up with the Saracens while abroad in the Holyland, nehat, motwithstanding thefe commotions Peached his ears, hostook no step to deprive Dongehamp of the authority he had usurped to but the was fuffered to continue for some time in the full enjoyment of his offices a till at last his infolence and oppressions roused up the barons, who, under prince John, met at Reading, and not only firint him of his uturpations, but compelled him to fly; and gave the office of Chief Jufficiar to the archbishop of Rouen, a charles daid w Pleas, land assine former be

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. If then we confider the feveral great offices velled at one and the same time in Puzas and Longchamp, the kingly and thority which they possessed, and the deep schemes of ambi? tion in which by their rivalship they were engaged, we cannot think that either of them, when in polletion of the office of Chief Jufficiary withed for the Aula Regis to hold a long fession; or that they had any great inclination, or much leifure, for the hearing and investigation of private matters referred to them. To their cabals and ambition then, more than to any thing elfe, we may look for the first separation of the Common Pleas from the Aula Regis; as in all probability, to fave their own trouble and time, they delegated the cognizance of civil concerns to others of the Jufficiars, who, for the better hearing thereof, and that they might not protract the fession of the Aula Regis, left the High Bench and retired into some convenient apartment to hear those pleas, which being merely civil, and more technically intricate, required a private discussion. Nor did the Chief Jufficiars think they were parting with their authority for ever, by fuch temporary delegations of it; as they referved to themselves the power of refuming it whenever they chose, and an appellate jurisdiction to rectify any erroneous proceedings in the causes referred to these substitutes. But the nation having once experienced the benefits arising from this newly constituted jurisdiction, loudly called for its permanent establishment; and the barons dreading the refumption of the power of the Chief Jufliciar in its full latitude, and glad to fee it once diminished, joined in the voice of the Commons. Accordingly, in the succeeding reign of King John, when he, to quell the insurrections of the great feudatories, consented to the two famous charters of English liberties, magna carta, and carta de foresta, the barons took care to provide, amongst other things equally calculated for the relief and protection of the fubject, that this court for the investigation of the civil concerns of the people should be fully established. With this article that unfortunate prince did not long helitate to com-

ply, having himself experienced many inconveniencies in the earlier part of his life from the fupereminent authority exercised by the Chief Justiciars, whose tyranny had extended itself, as well over the prerogatives of the King as the rights of the people and fo much lo, that he himfelf had once formed a defign to abolish the office, but which unfortunately proved abortive, from the great afcendency which that magiftrate had gained in the country. The barons therefore from their diffike of the office, under the pretence of relieving the people from the inconveniencies of following the Aula Regis from place to place to have their causes determined, made it an article in the great charter, that " Communia placita non fequantur curiam nostram, sed in aliquo loco certo teneantur". This article effectually established and confirmed the Common Pleas; and the loco certo, where these pleas were to be heard and determined, was fixed to be in a recess of the Great Hall of the Palace at Westminster, built in the time of King Rufus, where the Sovereign usually refided. The Common Pleas has * mostly fince that time remained in the fame place, while the court of the Chief Justice of England, which afterwards sprung from the old root of the Aula Regis, continues ambulatory with the Sovereign.

By the establishment of the court of Common Pleas or Common Bench, as it was stilled to distinguish it from the High Bench, whereon the Chief Justiciar sate as Representative of of the Sovereign, this Magistrate was intirely stript of another considerable branch of his jurisdiction; and his power was so much curbed by other articles in the Great Charter, ratified and confirmed by King Henry the third, that we behold this mighty officer gradually on the wane, during the long and troublesome reign of that King: towards the end of which there appears to have been no fuch Magistrate; for the last Chief Justiciar we read of in history, and it is even doubted whether he was Chief Justiciar or not, was Hubert du Burgh. The court too, in which this Magistrate used to preside, seems by this time to have lost its name of the Aula Regis, though whether it assumed the name of the King's Bench or not, till the succeeding reign of Edward the first, does not appear. For Bracton, who wrote towards the close of the reign of Henry the third, and was Chief

I fay mostly, contrary to the opinion of many, who affirm that it has ever fince remained there,—But that is not true, for by the statute 2 Edw. 3. c. 11. it appears, that the Common Bench had been removed; and that statute provides, that it shall not hereafter be removed without warning given the suitors.

Justice, speaking of the remaining jurisdiction in it, says, "6 Habet Rex plures curias in quibus diverse actiones termination nantur, et illarum curiam habet unam propriam, scut said Aulam Regiam, set Justiciarios capitales, qui propriam and causas Regia terminant, et aliorum omnium per querelam, set aliorum omnium per querelam, set aliorum omnium per querelam, set peaking of the Judges, says, "Item Justiciariorum quicos dam sunt capitales, generales, perpetui, et majores a latere cos Regis residentes, qui omnium aliorum corrigere tenenter

Besides the establishment of the Common Pleas, the Aula Regis, during the reign of Henry the third, had received other considerable shocks, particularly, that of the chancellor's withdrawing from it, and exercising his judicial authority alone in a separate apartment. But the precise time of the Chancellor's secession is not well ascertained, though there is great reason to think it took place in the course of that reign; and that it was owing to the intestine commotions and disputes which happened, not only between the King and the Barons, but between the Magnates Ragni themselves when assembled together, which wholly prevented the Chancellor from performing the ordinary sunctions of his office in the Great Hall of the Palace, where the Sovereign for the most part resided.

The jarring interests that prevailed between the greater barons and the less, when convened together, had long called for their separation. In the reign of King John they had for a while been disunited; for the first traces which remain of their separation, in the constitution of parliaments, are found in the great charter obtained in his reign; though omitted in that of his fon Henry the third, in whose troublesome reign they again clashed with each other. The continual dangers to which the king and people were exposed from the factions and contentions of these great feudatories when affembled. and it not being well fettled what distinct powers the affembly of the great or lesser barons should severally exercise, or where the extensive authority vested in the Aula Regis should reside, seem first to have suggested to young Edward who had subdued the potent barons, that great idea of our juridical constitution; which he afterwards upon his coming to the crown, with fo much credit to himself, and happiness to his subjects, firmly established .- This prince has been stiled our English Justinian; for in his time the law came to fo sudden a perfection, that Sir Matthew Hale does not foruple to affirm, that more was done in the first thirteen years of

his reign to fettle and establish the distributive justice of the kingdom, * than in all the ages fince that time put together. affigued juffices, and in that

King Edward's establishment of the constitution confisted. inflead of one court of univertal furifdiction possessing a legiflative as well as a judicial authority, and exercising a superintendent controul over subordinate jurisdictions, of ohe supreme court called the Parliament, composed of the fovereign himself, the tenants per Baronium, and the representatives of other inferior tenants holding in capite of the crown ; and after the + twentieth year of his reign of the representatives of the cities and burghs. In this court vested the fole right of legislation, and the exercise of an appellate jurisdiction in the dernier refort over all causes civil and criminal, unless of ecolefiaftical eognizance, which had before been given to the bishops; but which was only to affemble when fummoned by writ. The residue of the jurisdiction of the old Aula Regis he branched out into different courts, I which were called the superior courts of common law, and the king's the Changellor, on this divilion of the courts, was com-

Vide a fummary of the improvements made by this prince,

4 Blackft. Com. 425-6-7. And Hales Hift. Com. Law.

1 have affigned, according to Mr Hume, the 20th year of his reign, 12 Jan. 1269, as the true Epoch of the establishment of the House of Commons. For though there are still extant, writs from the 40th of Henry the third, to fummon as well knights, citizens, and burgeffes to Parliament, yet this was but owing to the fedition of the Earl of Leicester. But when Edward the first had got the better of him at the Mife of Lowes, the burgeffes were never fummoned from that time till the 20th of Edward the first; from; which period, with a few interruptions, the conflictution of the House of Commons appears to be regular, though the division, as we find it at this day, did not take place till some time after. Vide Mr Hume, 2 vol. 210. and 1 Rym. fol. 802.

1 My lord Hale, in his Analysis, has accurately divided courts anto such as are of record, and not of record. The former he

fubdivides into supreme, superior and inferior. The supreme is the high court of parliament. The fuperior he again subdivides into those that are more principal, as the Lord's House of parliament, the Chancery, King's Bench, Common Pleas, Exchequer, the courts of the justices itinerant, ad communia placita et ad placita foresta. The less principal he says, are the courts of goal delivery, Oyer, Terminier, Affize, Nisi-Prius and Palatinate, court of commission of Sewers, and courts of Juffices of the Peace. While he comprises, under the term of inferior courts of record, corporation courts, courts leet, fberiffs torn, &c. And courts not of record, he fays, are courts-baron, county-courts, bundred-courts, admirally and eccle-

courts for maritime and military concerns. He defined the limits of their feveral jurisdictions, so as not to interfere one with another. To each of them he affigned justices, and in that affignation feems to have had a particular reference to the peculiar provinces of jurisdiction exercised by the great officers respectively, who composed the Aula Regis. And he referved to one of these superior courts (that being the court in which he himself presided, and thence stiled the court of King's Bench, all fuch power as was not parcelled out to the rest, and which according to ancient custom was to follow his person in his royal progresses through the kingdom In this court fate as representative of the fovereign the successor of the Chief Jufliciar, but invested only with the tatters of his authority, whose title was now changed to that of Chief Juffice: of England, constituted by the King's writ; while the other judges of the superior courts were all appointed by patents With the change of his name, this magistrate lost his preeminence over the Chancellor of England, which the Chief Jufficiar bad always retained.

To the Chanceller, on this division of the courts, was committed the cuftody of the great feal of England, and, as confequent thereto, the power of issuing all the King's original writs, whether directed to the fupreme, fuperior, or fubordinate jurisdictions. The Chancellor therefore sate in a distinct court to hear reasons, why certain writs that were not of course should iffue, and by his fiat alone the clerks were empowered to make them out. These writs were called Brevia de Cancellata, in contradiffinction to the others, which were denominated Brevia de curfu, and iffued on paying the ufual fees for them. To the Chancelloral fo, as the King's chaplain. appertained the custody of his conscience; or, in other words, that jurisdiction which must necessarily reside somewhere in every flate, which makes pretention to independent privileges, to redrefs such injuries as the subject may suffer from the more immediate and personal acts of the sovereign. When the King therefore had granted any property or privilege to a fubject by patent, (which was and still remains the only method of transmitting any property or conferring any priinggshive that are more printegal, as the Lord's Horse of partiament

ecclefiafical courts. And all these (he continues) are bounded and circumscribed by certain laws and stated rules, with which all their judicial proceedings and determinations must square. Vide lord Hales's Analysis, which though little read at this day, on account of the excellent Analysis of Sir William Blackstone, still highly merits the attention of the student.

the Chancery, King Levels, Common Plan, Exchemier, the courts of

vilege by the crown) as the same passed under the great seal of in the Chancellor's custody, this officer had, when the great star was either prejudicial, improper, or forfeited, a right to hold had plea thereoff by a writ of Scire facias returnable before him lob select And is upon the hearing it was found proper to be 2 and pealed, to give judgment, § "quod predicte litere patents Do la mini Regis revocentur admillentur, et vacue et modide product unle penitus habeantur et teneantur, at etiam quod irrotulamen? tum corundem cancelletur, casseur et adnibiletur." Ingitu nominim bando sew and the same and all della or vinataogo as

When the fovereign also, upon any enquiry made by his officer, theriff, coroner or escheator, virtute officit or by writ fent for that purpose, or by commissioners specially appointed, became entituled to lands or tenements, or goods and chattels, to the Chancellor's jurisdiction were affigned, (when the record thereof was transmitted) all such pleas as might arise thereon upon any claim of a subject : it being an unquestion able privilege from the earliest times, for any one to come in and traverse or deny the sovereign's title. This power of traverling inquests of office, as they are called in our law books, in cases where a party is aggrieved, has since been farther extended by several statutes made in the reigns of Edward the third and Edward the fixth, by which the remedy is become universal in cases, where the subject before was driven to his ignitances taken before him. petition of Right. was differed either on the oure facios, traver leaf office or

To the Chancellor also, by the illustrious Edward, was given a new jurisdiction to redress further injuries affecting the subject from the inadvertence or misconduct of the sovereigned This was by the invention of that universal remedy for fuch matters, called the petition of right. Before this time, the subject had but two remedies against the crown, the one the traverse of office already mentioned, the other a monstrans de droit. This latter was the proper remedy in cases where the subject's title appeared by record to be of as high a nature as the King's. But as there were injuries by which the subject might be affected from the mere act of the crown, and where his title might not appear of as high authority as the King's, or where he could not come in and traverse the record, this prince, in the plenitude of his justice, introduced the petition de droit. This was the proper remedy therefore, when the King was in full possession of hereditaments or chattels, and any one could suggest a right to the same, at once controverting the King's, and grounded on facts, alledged

^{§ 4} Instit. 88. Bro. Sci. fa. pl. 69. pl. 185.

* Vide 33 Edw, 3. fol. 3. quoted in Bro. Prerog. de Roi. pl. 2.

in the petition itfelf ... The process adapted to the purfulent this remedy was as follows : on prefenting the petition to at the King, it was indorfed, by him feit droit feit al parties and w delivered to his Chancellor, who iffued a commission from the office of the Petty Beg, to enquire into the truth of the allegations, unless that trouble was faved by the confession of the King's own attorney. If the commission went, and the title was found by the inquest for the king, | a second commission might iffue, and even a third, to give the petitioner an opportunity to establish his claim. But if title was found to be in the subject, there issued another writ before he could interplead with his fovereign, to enquire also into the king's. And the reason of it was, that if a verdiction on trial was given for the party, the king was concluded of for ever-The judgment being, quod manus Domini Regis of amoveantur et possessio restituatur petenti, salvo jure Domini Regis # 500 which last clause is always added to judgments against the King, to whom no laches is ever imputed, and whose right de (till some late statutest) was never defeated by any length of the traverling inquests of office, as they are called i, smit to noistimil

in cases where a party is The Chancellor had also jurifdiction given him over all civil matters, (except pleas of land) wherein any officer of his own court was immediately concerned, and also of recognisances taken before him. But if any fact was disputed either on the Scire facias, traverse of office or the like, and iffue was joined thereon, the Chancellor was not permitted to try it. For as he had the power of issuing writs, he was prohibited from trying matters of fact, do least he should become as powerful as the Justiciar had been before; and, if he had been fuffered to try facts, he could of eafily have overturned the whole juridical system established by king Edward the first, and the common law itself by making out new writs returnable before himself, and giving unprecedented judgments thereon. Therefore in no cafe w when facts were controverted in chancery, was the Chancelent lor permitted to try them, but was obliged to deliver the record prepria manu, into the court of King's Bench, from w whence issued process to the sheriff to impanel a jury, whose a verdict when taken was indorfed on the record and returned to the Chancellor, a page and saw sid a droit ab noithful

when the King was in full poll

chartels, and any one could nigged a right to the time, at once controverting the King's, and ground 73. Reference on the controverting the controverting the controverting the controverting the controverting the controverting the could be controverting to the could be controverting the cont

^{*} Ibid 73. b. 1 2 Instit, 695. Finch. 1. 460.

junidiction over thefe feveral matters feems to have been all that was originally affigued to the Chancellor by our English Julinian; and though at this day it may appear to have been a very confined one, yet when we turn our eyes to the fituation of things in those days, and recollect that this officer was usually a bishop, and first minister of the country, we cannot but think that his forenfie avocation as Chancellor afforded fufficient employment for those Hours which were not taken up with the labours of the flatelman, or devoted to the duties of the prelate; and an rolleaned

toll next proceed to they who The occurrence of circumstances fince the days of Edward the First, has given this court that great influx of business, and accession of power which it enjoys now by English Bill; fimilar to that fort of jurisdiction which the court of Exchequer drew into it, and fill retains. But the peculiar jurisdiction by English bill for matters of equity, exercised by the Chancellon, feems to have arisen in the following manner. In the Roman law there was such a thing as an usufructuary possession, as distinguished from the possession of the thing itself and when the emperor Justinian's pandects were discovered by the Monks at Amalfi, they were fludied with great avidity by the Romish clergy, from which they derived the notion of Ufer, and introduced them into this country. For when by the statutes of Mortmain they were prohibited from purchasing lands in their own names, or from getting possession of them by a feigned recovery in a real action, or by their other inventions, they introduced the custom of having lands conveyed to their use. These conveyances being regarded in those days as a matter of conscience in the feoffer to uses, John de Waltham, who was Chancellor to Richard the fecond, by a strange interpretation of the statute of Westminster the Second devised the writ of Subpana and made it returnable before himself, to make the feoffee to ufes accountable to his Ceftui que ufe. From this scheme the clergy derived great advantages for a while, till afterwards the statute 15th of Richard the fecond, Chap. 5. declared such taking to uses to be within the compais and purview of the statutes of Mortmain, and such feoffments were amortized accordingly. But this process of subpana returnable in chancery, having been once introduced, it was afterwards extended to a variety of other cases in that court, and is now become universal. In an ancient treatise entitled Diverfite des Court, which Sir William Blackflone thinks was written in the fixteenth century there is a catalogue of all

With

matters then cognisable by the subpena. The process of hispune alfo foon found its way into the court of Exchequer, and came to be used there on the squity fide of it, as the fundamental and operative process to bring the parties into court ; and from the fame root have forung many ballard flips of equitable invildiction in the counties applatine, and other royal franchifes in different parts of the kingdom Having faid thus much of the jurifdiction of the court of Chancery, and of those matters which were assigned to the Chancellor on the division and establishment of the courts by our Edward the first, I shall next proceed to shew what fert of jurisdiction he permitted the Chief Juflice of England to retain, and exercise in the court of Kingly Bench.

and accelling di power witch it eniors now To the King's Bench, on the distribution of the power of the Aula Regis, was allotted a twofold jurifdiction guthe one over all pleas of the crown not relating to the revenue, -the other over fuch civil matters between subject and subject as savoured of a criminal nature. Of criminal matters or pleas of the crown it retained a supreme original jurisdiction, and was termed the Cuflos morum of the people, as, upon hearing of any offence militating against the first principles of justice or morality, it was impowered to inflict a proper punishment for it, and for that purpose might iffue process returnable before itself. would be satural and we north to

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bited from purchaling lands to their own mai The criminal matters therefore of which it had cognizance were of all kinds; but they were divided into crimes and mildemeanours, properly to called, and into pleas relating to franchifes and liberties. As to crimes and mifdemeanours, it had a jurisdiction affigned it over every species thereof, from high treason down to the most trivial trespass; and it had also a controlling power given it over all courts of criminal jurisdiction then in being, or that might be established. Over such as proceeded according to the common law, by writ of error, or certiorari; and over fuch as proceeded in summary way, or in a course different from the common law, by certiorari only, unless specially prohibited by the statute establishing such summary or extraordinary jurisdiction. If a matter came into this court by certiorari before trial, the King's Bench might fummon a jury, and try it at bar; and fince the statute of Westminster the fecond, may award a nisi prius to try it in the country, with the consent of the King's own attorney. And this court retained fo much of the criminal jurisdiction exercised by the Aula Regis, that, upon its removal with the fovereign, it ipfo facto suspended, if not entirely put an end to, all criminal proceedings before any other tribunal. Vol. I.

With respect to matters relating to franchires and Fiberties, if any tubject or body politic had uturped any franchite or privilege, this court issued the writ of que marrante, or received an information thereon filed ex offices by the proper officer of the crown, or filed fuch information on their own authority upon facts disclosed in the affidayits of private persons, provided there appeared sufficient ground for their extraordinary interpolition. If the ulurpation upon the trial was found unlawful, the party was outled, and the franchile, if capable of leizure, feized into the King's hands. Alfo in cafes where otherwise justice was obstructed or the King's charter neglected, in the reign of Edward the first was established a remedy, at this day frequently in use, called a Mandamus. This writ was framed to command and compel inferior courts, corporations, and magifffaces. to do that justice which in duty they were bound to perform. A mandamus is a writ of right, as some have imagined founded on magna charta, though no instance has been traced of its having iffued earlier than the reign of Edward the firft; but the court is bound to grant it, if applied for, without impoling any terms on him who demands it. Also when lifesior courts exceed the jurisdiction affigned them, this court had the power given it of issuing the writ of Probibition to frop any further proceedings, as being then coram non judice. And if any subject was illegally confined, he was entitled to the prerogative writ of Habeas Corpus, issuing by the common law out of this court in term time, or grantable by one of the judges thereof in the vacation. All which feem to have been the principal points of the criminal jurifdiction of this superior court, as allotted to it by King Edward the

As to the civil branch of its jurifdiction, that originally was very narrow indeed, though at this day it engroffes most of its attention. For as a court of primary jurifdiction, it had only cognizance of injuries alledged to have been committed with force, or in which the defendant was charged with fallity or deceit. Injuries committed with force were all tresposes vi et armis, and others of the same nature, as ejectment, replevin, rescous, pound-breach, and fortible entry. And those wherein the defendant was charged with fallity or deceit, were remedied by writs of conspiracy, deceit, and the like; for in all these cases the desendant was liable to pay a fine to the Crown, as well as damages to the party complaining. In what manner the court of King's Bench obtained cognizance of the various civil actions it now holds plea of, will be seen in a subsequent chapter; but it must

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be remembered, that this court was also constituted a court of appeal from the Cammon Pleas, and other inferior courts in the kingdom. And that a writ of error also lies in it from the king's Bench in Ireland, as well in those cales where the Chancellor proceeds according to the course of the common law, as upon petition de droit, monstrans de droit. traverse of office, scire facias to repeal letters-patent, or on recognizances, and executions upon flatutes. And from this court as being the superior court of the Lord Paramount, all prerogative process whatever issues to any place which has been, for may hereafter become, a part of the dominions of the Crown; and therefore when King Edward, by the conquest of Wales, had added that country to his dominions, the King's Bench had jurisdiction in Wales. When that King had also established his claim as Lord Paramount over the King of Scotland, the court of King's Bench actually fate at Roxburgh there, and afterwards summoned the Scottifh King and his vallals to appear at Westminster. So at this day it has a jurisdiction over Ireland, the Ille of Man, the Norman isles, and the plantations, by its prerogative writs; but with Sectland, or with the private dominions of the Sovereign, as the Electorate of Hanover, it has nothing to had the power given it of issuing the writ of Probibition o

The court of Common Pleas, which had been perfected and established by Mogna Charta at Westminster, was next in authority to the King's Bench; and as it was instituted molely for the investigation of the civil concerns of the People, has very emphatically been filed by Sir Eaward Cokes The Lock and Key of the Common Law. By King Edward's plan in this court, all causes whatever, amounting to forty shillings and upwards, of a civil nature between subjeft and subject, were intended to be decided. For here not only all real actions, unless where the King himself was a party, who might fue in any of his courts, but also all personal and mixt actions were to be prosecuted; though bein some personal and mixt actions the King's Bench had a concurrent jurisdiction assigned it, as in trespass wiet armis, replevin, ejectment, and the like: these sayouring of a criminal nature, and in which the defendant was formerly liable to pay a fine to the King. The Common Pleas had also a bujurisdiction given it over causes originally commenced in inferior courts, and at the instance of one of the parties,

complaining. In what manner the court of king's Bench obtained cognice Res JA to True Spi V. M. actions it now holds plea of, will be seen in a subsequent chapter; but it must

fometimes upon flewing cause to the court, at others without shewing any cause at all, was impowered to award process, as the writ of pae, recordari facias loquelam, accedas ad curiam, and false judgment, to remove the proceedings. But it seems that it had not the power to investigate errors in a judgment of a court of record, though some lawyers of eminence have supposed that such jurisdiction belongs to it. This Court too, as being one of the King's superior courts, was authorised, upon a suggestion made in termtime that an inferior court, whether temporal or ecclefiaftical, was exceeding its jurisdiction, or holding plea of a matter not cognizable by them, to award a prohibition, This right though no original plea was therein depending. of the Common Pleas to grant prohibitions was folemnly discusfed and allowed by all the Judges of England *; and Voughan + Chief Justice acknowledged such jurisdiction to belong to it. To this Court appertained, as it did also to the court of Exchequer, the right at common law, where any fuitor of it was imprisoned, to grant the writ of Habeas Corpus; and if he was illegally detained, to discharge him: but if it appeared that he was confined for a criminal matter, neither this court, nor the court of Exchequer, could proceed to investigate the charge, but were bound to remand him; or elfe, if the offence was bailable, to take bail for his due appearance in a court of criminal jurisdiction 1. And the Habeas Corpus act |, for the better fecuring the liberty of the subject, provides, "That it shall be lawful for any "prisoner to move and obtain his Habeas Corpus, as well " out of the high court of Chancery or court of Exchequer, " as out of the courts of King's Bench or Common Pleas, " or either of them; and if the faid Lord Chancellor or "Keeper, or any Judge or Judges, Baron or Barons, for " the time being, of the degree of the Coif, of any of the courts aforesaid, in the vacation time, upon the view of " the copy of the warrant of commitment or detainer, or " upon oath made that such copy was denied, shall deny any writ of Habeas Corpus by the faid act required to be " granted, being moved for as aforesaid, they shall severally " forfeit to the prisoner or party grieved the sum of five King's Beach; but this Petition for foliation barbaud "

* Sec a Ind. 68. 110. Co

foon afterwards enached, "That in all cate for Mish. Y Jac. N. Mish. 7 Jac. 1. 100 M. *

[†] Vide Vaugh. Rep. 157. 4 Inft. 99. † See Wood's case, 3 Wilf. 172.

^{| 31} Car, 2. c. 2. £ 10.

The jurisdiction of the Court of Exchequer has been already discussed, as the establishment of it took place long before the reign of Edward the first, though he certainly new-modelled it, when defining and afcertaining the jurifdiction of the superior courts on the division of the power of the great Aula Regis. In his time we find the court of Exchequer divided into the court of Pleas, the court of Receipt, which is the true center into which the Sovereign's revenues and profits ought to fall, the court of Accounts, and the court of Equity in the Exchequer Chamber, composed of the Lord Treasurer, Chancellor of the Exchequer, and Barons. To these courts King Edward the third added another, composed of all the Judges of England, held on account of some difficulty started in a point of law; the jurisdiction of which arises, when the Judges of the respective courts of King's Bench and Common Pleas are equally divided in opinion, or apprehend great difficulty in a case. Whenever this happens, they are directed by the statute 14 Edw. 3. c. 5. to adjourn the matter into the Exchequer Chamber, to have it argued by all the Judges of England. Before this statute the record in such cases was adjourned. and determined in Parliament, which was attended with great inconvenience; but however the same statute ordains, that if all the Judges in the Exchequer Chamber are equally divided, it shall be determined at the next Parliament by a Prelate, two Earls, and two Barons, with the advice of the Lord Chancellor, and Treasurer, and others of the King's council *.

In the same reign a Court of Appeal was also instituted in the Exchequer Chamber, for the examination of errors in the Exchequer, by the statute 31 Edward the third, c. 12. Before the establishment of this court, errors in the Exchequer had sometimes been examined before commissioners appointed by the Great Seal, and sometimes in Parliament; the uncertainty of which became a considerable grievance to the subject, and therefore Parliament was petitioned, so early as the 22d of Edward the third, that the erroneous judgments in the Exchequer might be examined in the King's Bench; but this Petition for some reasons was then disliked, and therefore not acceded to. But the Legislature soon afterwards enacted, "That in all cases touching the King, or other persons, upon a complaint of error in

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^{*} See 4 Inft. 68. 110. Co. Lit. 72. 6. and 2 Eulf. 46.

Therston t seems to have been decided, which was a first strained to the Bachen and the control of the seems to an a seem to the seems to a seem to the seems to a se

In the reign of Queen Elizabeth * also another court of Exchequer was established, for examining errors in causes originally commenced in the court of King's Bench which before that time, used to be examined in Parliament. in The practice of this, as well as of the other courts for the investigat tion of errors in causes commenced in the King's Bench and Common Pleas, will be feen more fully in the fecond you fume of this work. But as I shall have no opportunity of freating of the courts for the examination of the erroneous proceedings of the Exchequer, I cannot help remarking; that the Court of Appeal, founded on the flatute 31 of Edward the third, as amended by the 31 of Elizabeth, c. 1. 16 Car. 2. 4. 2. and 20 Car. 2. c. 41 of all other courts of error feems belt adapted to the great purpoles of juffice; the practice of the rest frequently affording delay, from the liberty given a party to alledge diminution in the record, which creates the necessity of awarding a certiorari. This court generally fits one the second Tuefday in every term, and, with the fix other courts before-mentioned, at this day confliture the whole of the Exchequer at Westminster ; the antiquity of which, with their feveral officers and duty, may be feen more fully in 4 Inflitute, 103. 2 Comyns Digeft, peculiar laperintendence. Lorbestmithis Birg! CVE their peculiar superintendence.

To the Inferior Courts King Edward configned a jurisdiction over all trisling actions, wherein the damage laid did not exceed fore; shillings. For by the statute of # Gloucester, it was enacted, and That none should have trespass before the King's Justices, unless he swear by his faith that the goods taken away were worth above forty shillings." The construction put upon this statute was, that it was only in affirmance of the Common-law, and the trespass intended was only trespass on the cose, and that it could not mean trespass with force; becaute no inferior court, was empowered to hold plea of trespass vi et armis. On this exposition of the statute of Glaucester, the case of Lambard and

INTRODUCTION. XXXXX

Thurston + feems to have been decided, which was an achonx of trespaid viet armies and damages laid to twenty hillings. only! to swhich declaration the defendant demused, and inflifted that the Court of King's Bench chad no jurisdiction, the damages alledged being under forty billings But to this objection the court answeredy that the trespale wiet appris under forey hillings, did not lie in a superior court, the party had no redress in such cases, because the ! Fine imposed in such action could not be set by an inferior court.

In the reign of Queen Elizabeth * also another court of The affidavit required by the statute of Glaucester, previa ous to the commencement of an action in the superior courts, that the matter in dispute amounted to forty shillings has long fince been difused in the King's Bench and Common Pleas, though in the Exchequer it is still a frequent motion to difmils causes of such trifling account as beneath the dignity of the court. The Legislature however, willing to restore to the inferior courts that portion of junifdiction originally intended by the Common Law, and confirmed by the ftatute of Gloucester, and of which they have been deprived by the difuse of the affidavit prescribed by that statute, has by a fide wind endeavoured to revive their confequence by the several statutes made to deprive the plaintiff of the costs of his fuit, upon obtaining a verdict in case the damages found by the jury do not amount to forty shillings on a navig vined if

which creates the necessity of As to maritime and military affairs, and offences committed within the limits of the royal refidence, which with other matters were cognizable by the Aula Regis originally; but which were usually referred to the Marshal and Constable, King Edward affigned them on the division of the courts to their peculiar superintendence. But the jurisdiction of these officers having no interference with the subject I propose to diffcufs, I must refer the reader to those writers who have freated more fully on it, and shall hasten to consider the process adopted by the courts of King's Bench and Common Pleas, on their separation, for the decision of causes, and the alterations occasioned therein at different periods of time for relief of the parties, and expedition of juffice a drigw erew ways never truction put upon this flatute was, that it was only in

dants; who were flable to be outlawed for non-payment thereof,

being a debt due to the Crown.

was only respass on the cafe, and that it 1831 daily Thean The fine originally imposed in such actions is taken away by the flatute 5 W. & M. z. 12. as being oppressive to poor defen-

records of the court, * which must have alledged a trespass, otherwise this court could not hold plea of it. When this was done, ihacking office Etherwastrahith o issue the bill, which was the only process he was authorized to award

Of the Original Process of the Court of King's Bench.

THE King's Bench, on the division of the jurisdiction of the Aula Regis, had, as we have seen, an original two-fold jurisdiction assigned it,—the one over all pleas of the crown, not immediately relating to the revenue.—The other over certain civil matters savouring of a criminal nature between subject and subject. The judges of this court, by their appointment, were the Sovereign Justices of Oyer and Terminer, Goal-delivery, conservators of the Peace, and supreme coroners of the Land. All pleas before them were stilled caram Rege, the King by the constitution of the court being always supposed to be present; for the Justices of the King's Bench and the Chancellor were directed to sullow the King, * so that he might have at all times near unto him some sages of the law.

The process adopted and used on the civil side of this court, now the subject of discussion, was a peculiar species of procefs, entitled a bill of that county in which the court, at the time of the complaint made, happened to be fitting. But this process it must be remembered, was only calculated and framed for injuries committed with force to the person or property of another, and for which the party offending was liable to pay a fine to the King, as well as damages to the plaintiff. For of fuch civil injuries only could the King's Bench hold plea of in the first instance; and these they were empowered by the fundamental constitution of the court to determine, without any original writ out of Chancery. An original process of its own for apprehending of trespassers, and those accused of having committed any forcible injury, was necessary for this court, as by its coming into any county it immediately superseded the ordinary administration of justice by the general commissions of Eyre and of Over and Terminer. The party, therefore, to whose person or property any injury, accompanied with force, had been committed, had liberty to apply to this court for redrefs; and, in order that process might be awarded to bring in the offender. the plaintiff drew out his complaint and entered it on the

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records of the court, * which must have alledged a trespass, otherwise this court could not hold plea of it. When this was done, the clerk of the court was warranted to issue the bill, which was the only process he was authorized to award in the first instance for such fort of complaint: This bill was directed to the Sheriff of that county in which the court happened to be, supposing that the defendant was to be found there; for this process could not issue immediately into any other county than where the court was, as it had no immediate jurisdiction of civil matters though tontra pacem elsewhere, and was to this effect:

It is commanded the Sheriff of Middlefex greeting, It is commanded the Sheriff, that be take C. D. if he be found in his bailiwick, and lafely keep him, fo that he may have his body before our lord the King, on —, wherefoever he fhall then be in England, to answer A. B. of a plea of trespals, and that he have there this precept."

This Bill was only a precept and not a writ, because it was not tested, whereas all writs are tested \(\frac{1}{2} \). It was made returnable on some particular day in term, for this court contrived always to sit at the time appointed for the other courts to meet, which was only in term time. The terms were stated times in the year, so ordained, that all law business in the superior courts might be transacted at once, and they were usually appointed in winter and summer, that proper vacations might be left for keeping of holy days, and that the people might not be called away in seed-time and harvest to attend their causes in court. This process was made returnable also, on a certain day, wheresever the King should then be in England, for, as this court was to attend him wherever he went, it was wholly uncertain where the King might be at the return day; therefore no place could be expressed in it: But the royal residence being a matter of suf-

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^{*} Trye's juf. Filizar. 98.

[†] All writs, process, pleadings, and law proceedings whatever, from the time of the conquest till the 36. of Edw. 3. were in the Norman French language. But by that statute the pleadings, &c. in court were directed to be in English, though engrossed and entered of record in Latin; and so they continued till the 4 Geo. 2. c. 26. when they were directed also to be engrossed in the English language.

† Sid. 129.

ficient notoriety, the gourt obliged * Sheriffs and those who had the execution of process, to take notice thereof virtue officit, at their own peril. If the Sheriff apprehended the defendant, he was to keep him and produce him in court on the return day; for if he let him at large, and he was not forthcoming, the Sheriff was not only liable to make amends, to the plaintiff, but might be proceeded against by the court, for a contempt. If, on the other hand, he was not apprehended at all, the Sheriff might fafely return a " non eft inventus," indorsed on the writ. Or if the defendant had fled into a liberty or franchife, into which the Sheriff could not enter to execute process himself, (provided he had sent a warrant to the Steward or Bailiff thereof to arrest the defendant) he might return on the bill, " Mandavi ballivo, Gc. et nullum dedit responsum, &c." reciting the special matter and that no answer was given. Upon this latter return, the plaintiff might sue out another process called, a " + Non omittas bill," directed, as before, to the same Sheriff, reciting the former bill and return, and commanding him to arrest the defendant, notwithstanding any liberty or privilege place in his county.

If non est inventus was returned to the Bill, and the plaintiff had reason to think that the desendant was still in the same county, he might have another bill, and after that a third, and so on till the desendant was caught. But if the desendant had removed into another county, the next process the plaintist might sue out against him was a Tostatum bill, directed to the Sheriff thereof, which soon gained the name of a Latitat, from that word being within it. This Testatum bill was a writtested in the name of the King, and in it was recited the sormer bill and return, and then it was stated, that on the plaintist's behalf it was attested, that the desendant did run up and down, and secret himself in that county, therefore it was commanded the Sheriff to take him, and have his body in court an such a day, wheresoever the King should then be in England.

But it feems that in early times it was an usual exception for an indifferent person to say, He did not know where the court was.

Vide Ld. Raym. 532.

The statute Westm. 2. c. 39. is the first statute which makes mention of a new omittas writ, though lord Coke supposes such writ was at Common Law, because mentioned by Bradon and Fleta, and it certainly was often awarded before the statute West. 2. But after this statute an action lay against the Sheriff if he entered a franchise without a new omittas writ.

fuit,

If the defendant happened not to be arrested before this process was spent, but a non est inventus was returned on it, the plaintist might sue out other process to the like essect, either into that or another county, till the desendant was caught. Or if a mandavi ballivo, &c., was returned on it, by reason of the desendant's escape into a franchise, the desendant might sue out a non omittas latitat, at once authorizing the Sherist to enter the franchise in execution of the process. For as the Bailists of franchises were Bailists to their lords by particular grant from the crown, the Sherist could not enter a franchise, without a special authority. Nor was the Sherist answerable for the Bailist's false returns because they did not belong to them, but to their own Lords; such return therefore was made by the Lord's Bailist, and not by the Sherist's Bailist.

But if the Bailiff of the franchise had made an insufficient return, and the Sheriff returned that to the court, they formerly held the Sheriff was answerable, and not the Bailiff. For an insufficient return is no return; and so the Sheriff ought to have said, nullum dedit responsum. But this was altered by the stat. 27 Hen. 8. c. 24. which ordains, that the americaments for insufficient returns made by Bailiffs of franchises, shall be set on the Bailiff's head and not on the Sheriff's: so that it seems, that after an americament for an insufficient return, which was as none, a non omittas might be awarded.

When, however, the defendant was arrefted, either on the bill or the latitat, the same was indorsed with cepi corpus; and accordingly the party, at the return, was brought into court, when he was either delivered over to the care of the * Marshal, or suffered to put in bail to stand the event of the

^{*} Though the Earl Marshal by the 28th of Edward the first, that 2. c. 3. had a particular jurisdiction assigned him, yet this great officer of the king's houshold had the custody of all the prisoners in the Court of King's Bench, and detained them in the Marshalsea Prison, as appears by the 39 Hen. 6. 32. b. Spelman, verbo Marsfellus says, that all the Marshalseas, viz. Marshal of the Marshalseas, Marshal of the King's Bench, Marshal of the Exchequer, we are all derived from the Earl Marshal of England; and that he had granted the Inheritance of the office of Marshal of the King's Bench out of him. Vide Lord Raym. 1177—And per Halt C. J. I. Raym. 805, the office of Marshal of the King's Bench Prison, was not derived out of the office of Earl Marshal of England till so late as the time of James the first.

fuit. In such case an entry was accordingly made. But, if he could not find sureties, he was brought up from time to time by the officers of the Marshal, till the matter was finally heard and determined.

Of the original Process of the Court of Common Pleas. When the defendant was once brought into court, the plaintiff within a certain time was to declare against him, or recite at large his complaint; but, before the defendant was put to make his defence, the court obliged the plaintiff, according to the old Saxon custom, to produce two or more persons as pledges or fureties, who stood as a security for him that he would profecute his fuit with effect, and without delay, which if he failed to do, these pledges were amerced. The precise time of finding these pledges does not seem well ascertained. For lord Coke says, " He that sueth by bill shall find pledges de prosequendo in fine billæ, but this has been controverted." The better opinion seems to be, that the pledges in this case were not always required upon first entering his plaint on record, but it was sufficient if the plaintiff produced them at any time before the defendant was called upon to make his defence. When these pledges however were found, the defendant was brought up in perion to plead to the charge, or appeared if he was admitted to bail, till the statute & Westminster the second, empowered him to appoint an Attorney; to which plea the plaintiff might reply, and thus the parties went on till iffue was joined on a matter of fact, or point of law: all which proceedings, till final judgment was given, were had ore tenus in court, and minuted down by the clerk.

If Sheriffs neglected or refused to return writs delivered to them, the plaintiff was directed by the Statute Westminster the second c. 39. to make complaint to the Justices; whereupon a Writ Judicial went to the Justices assigned to take the assizes, to enquire of such as were present at the deliverance of the writ to the Sheriff, if they knew of the deliverance; of which an inquest was returned. And if the inquest found that the writ was delivered, damages were awarded to the plaintiff or demandant, having respect to the quantity or quality of the action, and to the peril that might have come by reason of the delay. The like remedy was also given against the Sheriff, in case he made a salse return of tarde, or that the writ came so late that he could not execute the commandment of it. But this method of proceeding against Sheriffs has long since feil into disuse.

^{* 4} Instit. 180. ‡ 12 El. Dyer 288. 20 Ed. 3. Pleages 11.—9 Hen. 4.9.—2 Hen. 4.17.—18 Edw. 4.9.—2 Hen. 7.17. § 13 Edw. 1. CHAPTER

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fulf. In fuch talk an entry was accordingly made, But, if he could not find fureries, he was brought up from time to time by the cold will T. AH Taly AHTTA HEZER was finally

Of the original Process of the Court of Common Pleas.

HE court of Common Pleas, which, in consequence, of Magna Charta, was established at Welming. intended by King Edward's plan to hear and determine all the civil actions of confequence, whether real, personal, or mixt, arifing between subject and subject. But this court had not an original jurisdiction given it as the King's Bench had, but only a delegated authority to investigate those matters which were expressly referred to it. For the Norman maxim was still adhered to in this, that there should be no proceedings in Common Pleas between the People before the King's Justices, without his original writ; holding it unfit that those Justices, who were only the substitutes of the Crown, should take cognizance of any thing but what was particularly referred to their judgment. The party therefore who had a cause of complaint, and was enabled to fue in the Common Pleas, first resorted to the King's high court of Chancery, the grand repository of all original writs, and where the same were to be made out according to the nature and exigency of the case, and there purchased his original + writ, adapted to the fort of injury he had received, and fought to have redressed. The plaintiff paid

† Dicuntur brevia (lays Fleta, who wrote in the time of Edward the first) cum fint formata ad similitudinem regulæ juris, quæ breviter et paucis verbis intentionem proserentis exponunt, sicut regula juris, rem quæ est breviter enarrat; non tamen ita debet esse breve, quin rationem et vim intentionis contineat, &cc.

CHAPPER

-2 Hor. 4. 17. - 18 Food 1 good line

It must be remembred, that many persons were disabled from profesuring any suit formerly, as Aliens, Jews, persons excommunicated, guilty of a pranunire, attainted, outlawed, Sc. and some of them are disabled even at this day from prosecuting any suit while their disability remains. But the necessity of trade has gradually mollished the too rigorous rules of the old law in their restraint and discouragement of aliens. For an alien enemy, who is here in protection, and a Jew, who was looked upon as an enemy till commerce taught the world more humanity, may now have the same justice done them as a natural subject. Wide Ld. Raym, 282, &c. Villeins also were disabled from suing any other than their own Lord, and him only for an atrocious battery, as they could acquire no property during their Villeinage.

Charter were in nulli vendenus, nulli negatinus in the Great Charter were in nulli vendenus, nulli negatinus in nulli different remus justitiam vel rectamili. For this article was only meant to provide against any subject being in suure aggrieved by those enormous sines sormerly exacted by the Sovereign and his Chancellor upon giving permission to sue in the King's courts; and as these sines upon original writs were by this time well ascertained, and reduced to a certain standard, the people did not hesitate to comply with them. In the course of this Introduction, I shall find another place to treat more particularly of the nature of these sines payable upon original writs, as even at this hour they continue to be exacted by the Curstors.

only fought a recompend To obtain his original writ, the plaintiff made out a little abstract or note, called a Pracipe, for that fort of writ he was advised to pursue, and carried the same to the Chancery, where, on application to the Cursitor of the county in which his cause of action arose, the original writ was made out for him, returnable in the court of Common Pleas. Original were in their nature twofold, and were mandatory letters from the King, fealed with the feal in the Chancellor's custody, directed to the Sheriff, and either required him to command the defendant to do justice to the complainant, or appear in the Common Pleas at Westminster on the return, to flew why he did not comply; or elfe required the Sheriff immediately, without making any previous command to give up what was demanded, to take a fecurity for his appearance in court. The first fort of writ therefore was optional, the latter a peremptory, and they were called by the names of a Pracipe quod reddat, and a Site fecerit fecurum, or, for fhortness, a Pone. and daidw eases

The pracipe quod reddat was proper when the plaintiff's action was for a specific thing, as for the recovery lof a debt certain, or for the restoration of such a chattely or for the giving up such a house, or so much land, specifying the nature and quantity of it. And if upon the Sheriff's request the defendant did not comply, he was to summon him to appear at Westminster, at such a day in term. But before ever the defendant was made acquainted with this writ, the Sheriff was to take pledges from the plaintiff to prosecute his suit with effect, if he had not already sound them in Chancery upon suing out the writ. These pledges were in those days real and responsible people, and not mere nominal persons as of late; and the taking of them was usually entrusted to the Sheriff, as he best knew those

and preferve

them, lift the plaintiff did not prevail in his fuit; and if they could not answer the amerciament, the Sheriff was liable to the King for their infufficiency in At the day specified in the writt dors within a day or two after, the Sheriff returned to the court of Common Pleas what had been done in purfurnces of its and if the defendant disobyed the Sheriff's verbal monition, the returned has well the names of those by whom the defendant had been warned or summoned to appear, and some or summoned to

upon original write, as upon at this hour they continue to The fi te fecerit fecurum was proper when the plaintiff only fought a recompence in damages from the defendant for fome injury done by him. This writ authorized the Sheriff, if the plaintiff made him fecure to profecute his claim, to put the defendant by fafe gages and pledges to appear at Westminfter at the return, to answer the plaintiff's charge contained in the writ. In this cafe, if the defendant could not find pledges of sufficient responsibility for his due appearance in court, the Sheriff was authorized to take pages, that is, some of his goods and chattels into his custody the better to compel his attendance. Whatever he did therefore in confequence of this write he returned to the Common Pleas. Neither by this writ, nor by the pracipe, was the person of the defendant at all molested, so tender was the law in those days of the liberty of the subject infor of his personal freedom no man could legally be deprived. unless for some criminal flagrant offence injurious to the government under which he lived or for some tortious act committed with force, and confequently in breach of the peace, which his allegiance and duty required him to keep and preserve.

a left the defendant was not to be found in the county, or had no house or land whereon he could be summoned or warned to appear [for in real actions a warning on the land by creecting a white stick or wand was sufficient] the Sheriff returned the writ indersed with a nihil, or "nil babet in balliva mea per quad summoneri patest," that the plaintiff might sue out process elsewhere against him.

writ, the Sheriff was to take pledges from the plaintiff to encount at the plaintiff to such a true and the parties and the balloff of such and the balloff of such and responsible people, and not not were in those days real and responsible people, and not

mere nominal persons as of late, and the taking of them was usually entrusted aftered? Accessing as he best knew those

If the defendant had been summoned, and did not appeared the defendant had been summoned, and did not appeared there within four days, the quarte die past of the return of them writ, or lend an essent or sufficient excuse to the court whyou he could not attend, the plaintist was at liberty to take out it a further process against him. Of the essent we shall have soccasion to speak more fully hereaster; at present the it is so fice to tay, that these intermediate days were ablowed an excuse by the court, and partly arose from an idea entering tained by our ancestors, that it was beneath the dignity of a free man to appear or do any other act, at the precise time for that purpose appointed, and partly from a consideration of the court, that some unavoidable accident or other might do so lend an excuse, and had no intention to disable the value of the source.

The next process which issued from the court of common Pleas upon a disobedience of the original weit, was a called an Attachment, and though it could not actually be suffered out till the quarto die post of the return of the original, of might yet bear, * teste on the very return-day of that writes are gages and pleases the desendant, so that he appear at Westminster on such a day in term. These gages were again to forfeited, and his sureties also amerced in case of his non-appearance within the quarto die past of the return of this writ of attachment, unless he had sent an essential time to a excuse his default.

The subsequent process to the attachment to compel an appearance was a writ of distringuis, which bore tests on the very return day of the writ of attachment, though not actually fined out till the quarto die post inclusive of such return; and if the defendant again made default, a like writ might issue ad infinitum, commanding the Sheriff to distrain the defendant from time to time; which was done by taking his goods, and the profits of his lands, called Issue, which

were

^{*} It was settled that all original writs, and other process founded thereon, should have fifteen days between the refle and return, in order that there might be time for the Sheriff to make the summons; Booth 5. and that a man might come from the remotest part of the kingdom, which he is enabled to do within that space of time, at the rate of travelling twenty miles each day; so many miles being computed a day's journey by the law, and thence called Dieta. 2 Inst. 267.

were all forfaited to the King if he did not appear . And here the the common law the process determined with the most continuous desendants in all civil injuries that were not accompanied with first; the desendant being gradually stresses it in had any, by repeated differences, till he rendered obedience to the writ: and it he had not substance; the law then considered him as incapable of making satisfaction, and therefore looked upon all further process as nugatory.

But for injuries committed with force to the person, property, or pollesion, of the plaintiff, the law, to punish the breach of the peace, and prevent its diffurbance in future, provided also a process against the defendant's person. But even before this process could iffue, a pone or attachment was awarded against him, but without any previous lummons, on which he must have made a default +. And this process was allowed, not only in actions of trespals vi et armis, but alles for some other injuries, which, though not forcibles are yet trespulles against the peace, as deceit, and conspiracy; because in all these cases the violence of the wrong requires a more speedy remedy for the party aggrieved. This process was called a copies ad respondendum, which at once authorized the Sheriff to take the defendant, and imprison him till the seturn-day, and then produce him in court. capitat was made out conformable to the original writ of pone or attachment before fued out and returned, and bore tefte on the recurn-day of that writ; for the capias was no other than a process of contempt, upon a disobedience to the original. The capias, as well as all other writs, subsequent to the original, were denominated judicial writs, ing grounded on what paffed in the court of Common Pleas in confequence only of the Sheriff's return, and illuing under the private feal of that court, and not under the Great Seal of England; and being teffed allo, not in the King's name, but in that of the Chief Juffice only.

If by this process the defendant was arrested, the Sheriff returned it, with cepi corpus indorsed. But notwithstanding this writ commanded the Sheriff to take and secure him till the return day, he might, at his own peril, have let the desendant continue at large; though he was liable, in case of his non-appearance in court, to make amends to the

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plaintiff in an action for an elcape, or to process of a gri minal nature from the court, for the contempt in not producing the body pursuant to the return he had made on the writ. If the defendant could not be found by the sheets he might return the writ with non est inventus, and then the plaintiff might fue out another write called a tellatum capias. into a different county, in which it was apprehended the dafendant was gone; and after that an alias, and pluries conias. Or if the defendant had fled into a franchife, where the Sheriff could not enter to take him, he might have returned the writ (provided his mandate to the bailiff thereaf to arrest him had been disobeyed) with maniforni balling et nullum dedit responsum; on which return the plaintiff was at liberty to fue out a non amittas capias, empowering the Sheriff to enter and feize him. But the non omittas capias from the Common Pleas Comewhat differs from the man comittas writs of the King's Bench ; for thefe give authority to app prehend the defendant natwithflanding any liberty in his bailiwich, whereas the non amittas writes of the Cammon Pleas specify the particular franchise, and command the Sheriff to take him, notwithstanding that liberty, as the liberty of A mons on the pracipe, was the writ of grand cashiwiliod sid ni

Mben the desendant voluntarily appeared in courtiage cording to the teturn of the writ, he found pledges or built for his suttendance therein till the suit was finally despects of capiar, unless he found maintrize of sufficient ter spontibility sor his appearance from time to time in court, and abiding the event of the judgment, he was committed to the prison of the Fleet, and brought up in custody of the Warden thereof, as occasion required, to make his defence, till the statuse Westmander the second empowered him to appear in his steed in own in that a

demandant justified on the detault, and the tenant saved it, set it, considering and flum cis (resigns to elegany and yded ot the brightest of the bluon anappress of the bluon anappress of the brightest of the bluon anappress of the bluon anappress of the considering and the same along the same along the set of the considering the same along the same along an of the same along as a same and the same along as the same along the same along as the same along the same along the same along the same and the same and the same along the same along the same and the same and the same and the same along the same along the same and the same and the same and the tenant the demandant. If after appearance, however, the tenant the demandant. If after appearance, however, the tenant the demandant of the same and the

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12 In profecuting rear actions in the court of Common Pleas, the speciff therein was framed like that used in fuch actions in the Lord's court below. For there, if the tenant made de male on the lummons to the Lord's court; the lands demanded were immediately feized, and if bir the leizure the tenant die not appear, and offer a sufficient excule for his the demandants as one who was ready to take on him the feudal ducies which the former tenant had renounced. Or H default was made by the tenant after he had once appeared to the Turt, the lands were also in that case serzed by the Lord, and adjudged to the demandant for the tenant's breach of his duty, unless he came in after fuch ferzure and ext culed his former default. So when the Lord remitted his right to the King, and it came to him as Lord Paramount, the process awarded above, upon default made after fummons on the pracipe, was the writ of grand cape, to feize the lands for the King, and to warn the tenant to appear in court at the return, to excuse his default on the summons; which if he neglected to do, or did not fave his default, by thewing that he was either not properly Tummoned before, or that he was prevented by mundation, tempelt, imprisonthene of other mytherble necessity, Judgment was given for the demandant. But in cafe the demandant releafed the default; then the grand cape was confidered But as the Thumder, and the demandant proceeded to count against Aim; 35 of he had regularly appeared at the first non This refeate of defaults was often made. If there had been really a fault in fummoning the tenant? But if in fuch cafe the demandant justified on the default, and the tenant faved it, by thewing fome lawful excule, the writ wholly abated ; because, by justifying on the default, the demandant reflect his caule on the tenant's failure in duty, and not on the merits of his claim. But if affer appearance by the tenant the funitions, and a forther day given, he hade a de-fault, the process awarded was a peri day to the ze the lands, and warlf the Renanc to come this and head judgment. Oh the return of which, if he did not fave his default, by at-Tallying a numericat excurey the was confidered as having failed in his duty, and thereupon judgment was given for the demandant. If after appearance, however, the tenant had a prayed and imparlance and another day of ather fame hed oledges but mainteress. 31 Edo 3. mainprize 21. a Inft. 180.

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o. ne term, and then at that day made default, no petit cape was awarded, but the lands were inflantly leized, and judgment was promounced for the demandant; because in fuch cale a day was given the tenant, at his own expence, which he ought to have duly attended to. But in cale the tenant imparled to another term, a petit cape then was always awarded, in order to bring the party into court, before judgmen could be pronounced on default. On this account it is at this day, that when a demandant in a common recovery. this day, that when a demandant in a common recovery, craves to imparle, a day is given him in the lame term; for otherwise it would be necessary that a petit cape should iffue, which would not only prolong the seigned suit, but create an additional expence to the parties concerned in it.

Thus did the respective courts of King's Bench and Common Pleas at their establishment, proceed to bring defendants before them. In what manner the King's Bench obtained cognitance of civil actions unaccompanied with force, and how the process to compel an appearance in the Common Pleas which foems to exceedingly dilatory came to be altered. shall take an opportunity of thewing hereafter. But I cannot conclude this Chapter without making further mention of the pledges, which we have been were required in all cales of the plaintiff, and in many instances of the defendant.

The finding of pledges was an inflitution of the great ing of ten families each, and those numbered in each decenwary he made the mutual and standing pledges for each other's due obedience to the laws and prefervation of the public peace. No one by his establishment could profecute any civil action whatever, unless he could find two or more of the fame deof complaint, and was not of a litigious and quarrelfome tempera. And as the defendant was to be put to some trouble and expence in contesting the suit, these pleases were always required of the plaintiff immediately upon his, com-plaint to the court. The intaller attangement of the people in decembries from falling into diffule, from the difficulty there was of enrolling every jubject, and claffing those for reigners who cafually reforted here to carry on trade, and had no fixed habitations in England, it was thought sufficient it the plaintiff upon commencing a fult, and the derendant upon being ched to appear to it, found pleages of the same hundred or county with himself. The finding of pleages was for real chable an institution, and to well calculated to prevent both vexation and delay, that in the various revolutions of the plant of the country of the co

names of the pledges were not interted at the end of

the government, from Alfred's time till long, after the reign of Edward the fuff, it was payer once discontinued or abouthed.

Upon the division of the courts, however, in his time, when their feveral jurifdictions were afcerrained and eftablished, an alteration took place with regard to the time when the plaintiff a pledges for projecution should be found, and by whom they should be taken. If the plaintiff sued by arginal with 18furnable in the Common Pleas, his pleages were usually found in the Country and taken by the sheriff, before ever the defendant was summoned to appear to the action, and their names were returned by the theriff upon the original. But in the King's Bench, when a plaintiff filed his bill of complaint King's Bench, against the defendant for an offence contra pacem, (for otherwife that court had not cognisance of it) they did not always require him now to find his pledges, before the process went forth to the theriff to bring in the party; because as that cours was ambulatory and followed the Sovereign, the plaintiff might not have his pledges at hand, or be known to any one in the county where the court at that time happened to be fitting. Belides it was imagined, that one who had com-mitted a forcible injury in breach of the peace was likely to avoid being taken, as the commission of such an injury made him not only liable to pay a fine to the king, as well as damages to the plaintiff, but also subjected him to an imprisonment before trial or conviction. The court of King's Bench, therefore, did not as formerly infift upon having the pleases, before process was awarded to bring the defendant into court; as, to have waited till the plaintiff could have produced them. would have occasioned a causeless delay to the inquiries of juffice, and at the same time afforded an opportunity for the defendant to effect an escape, and avoid the most diligent tennary as pledges, to facisfy the court that the first

But when the defendant was apprehended or brought into court by the bill or its subsequent process, the plaintiff was called upon for his pledger, and if they were not produced when he came to declare, the defendant might have demurred or pleaded in abatement, for he had no occasion to make any defence till they were found. So that, when pleadings are tenus in court were distuied, and came to be entered in writing by the clerk, and copies thereof made out for the parties, the names of the pledges for the prosecution were always entered in this court at the end of the declaration, that being the stage of the suit in which they were obliged to be sound on the process by bill; the form of which entry, though the finding of real and responsible pledger has long since ceased, continues to be used to this day. But in the Common Pleas, the names of the pledges were not inserted at the end of

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poque (farible that is bestimper enew eventral encoder a minutal solution in large bands that no excaption and the control of since that no excaption all a control of since the since that the control of the control o

by the court, and the entry thereof in the judgment was self-the court, and the entry thereof in the judgment was self-the confideration of quod predict, quarent it pley ful depositions are in the judgment was element of the uniferitaria, &c. but without taking any fund certain. After which the amerciament was element, then delivered to the clerk of the affize in the circuit, who afterwards delivered the fame to the coroner of the country, who afterwards, that is, affected the amerciament according to the party. And that affection of the vexation, and the ability of the party. And that affection by the coroner was held a fatisfaction of the statute of Magna Charta, which provided that "nullus predictus mifericordiarum ponatur, nist per sacramenta proborum ex legalium bominum de vicinate."

Sheriffs in time growing remils in their duty, allowed of any persons as pledges, and sometimes returned the names of fictitious persons as pledges, at others, neglected to require or return any at all. And the the want thereof might have been taken advantage of by demurrer, plea in abatement of afficined for error; yet the courts in their liberality of late, tooner than the plaintiff should be delayed, or that their judgment should be liable to be reversed for so frivolous an objection, which did not affect the right of the furt, would fuffer the placetiff to find them at any time pending the luit, and enter the names as if really found at the proper time to the therest or court. And the Legillature to lupply the want of real perions as pledger, and recompence the defendant where he has been unjultly or vexationly fued, has by various flatures either given him the cofts he has incurred in making his defence; or elle deprived the plaintiff of recovering those costs he is entitled to by law, in cales of obtaining a vergict, by leaving it to the Judge at the trial to certify on the record, that he had little or no cause of action. , Since these factures for allowing the desendant his costs, where the plaintiff is ponsuited, the writ to the coroner to affeer the pleases has fallen into dilute, and two good natured personages, Jahr Doe and Richard Ree, from their universal acquaintance and peculiar longevity, have become the ready, and common pleages of every fuitor. The want however of their names upon the bill or eriginal, was not aided ull the flat, 16 52 17 Char. 2. 2. 8, though a verdict had been had for the

Vide 8 Co. Griefley's Case, and 1 Lord Raymen, 380.

plaintiff is illustrate the petron removal of this ground as obtained interesting the petron of the plaintiff of the petron of the plaintiff of the petron o

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The court of King's Binch, we have seen, on its establishment, had an original jurisdiction over all criminal offences or pleas of the Crown; but of luck civil matters only as were in breach of the peace, and therefore denominated trapages; as appears plainty by the treatiles of Britton and Ricks, who wrote in the leigh of Laward the lift, and who, in describing the jurisdiction of this court in civil matters, affirm it to be, "o amend talk judgments determine appeals, and other trespalles committed against the peace, it encountry notic jurisdiction, which is, says an Edward Colle, to grant prohibitions. Tied up to the trial of criminal offences and trespalles only, the inveltigation of the erroneous judgments of infestor courts, and the presence jurisdictions instituted by the crown, this court found tiest left with little of no business to engage its attention. From this small share, of employment too, a great part was again taken off by the Justices in Ryre, of Oyer and Terminer, and goal delivery, and the conservators of the peace in the country; to which Justices in their strongs of the peace in the country; to which Justices in their strongs of the peace in the country; to which Justices in their strongs of the peace in the country; to which Justices in their strongs of the peace in the country; to which Justices in the firmings which they palled were referred. And though it appears from the records, that this Court usually late in the entry of the peace in the country of the peace o

Mansheld v. Richman. East. 2 Gec. 2. Fort. 330, 1 Wilf. 226. OSE + White 1421 bas old version of said terms

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per from to confined a jurisdiction, there was not buffield from to confined a jurisdiction, there was not buffield from to congage its daily attendance to Boy it build not long before this Court contrived to draw some civil actions within its jurisdiction, and in process of time gained cognizance of almost every matter which the Common Pleas was purposely formed to investigate. So that from continual usurpations, if I may be allowed the expression the court of King's Bench has gradually regained that jurisdiction over civil transactions which the Jula Regist exercised of old, but which our forestaters, by the Great Charter of Freedom, endeavoured to secure from being heard and determined elsewhere than in the court of Common Pleas, and allowed the

meant to prohibit them The necessity which had called for the establishment of a confiant court in the Capitol, shewed itself more and more every day so The sparticular connection formed with the continent, and the intercourse opened with other countries in Europe, had introduced a spirit of commerce among the people. Foreigners were permitted to refort here, and carry ond trade, without molefration or hindrance. A speedier may for the recovery of debts had been inflituted in the reign of Edward the first, by granting execution, not only upon goods and chattels, but also upon lands, by writ of and which was of figural benefit to a trading people, and supon the lame commercial ideas, former refraints upon Janded property were taken off, and the charging it in a Matute-mertbant, to pay debts contracted in trade, was allawed contrary to all feodal principles. Thefe improvements which the gradual extension of commerce had occafisned intentibly wrought a wonderful change also in the manners of the people. Trade began to be embraced by those orders of men who had formerly looked upon it with an eye of contempt; and while the merchant and mechanic grew rich by the faturns of their industry, the nobleman, by endeawound goto furpale the entired in magnificence, was greatly impoverished, and his tenants were becoming poorer from the flaville burthens imposed on their tenures. In this progress of lociety, divigations unavoidably increased has the contracts and engagements entered into for the purpoles of carrying on trade, the mutual credit that was necellarlly required, with the farlures of fome, and the diffioneffy of others, together with the contrariety of opinions and confirections to which their engagements were liable; all conspired to open new sources of dispute. The multiplicity of caufes, arifing from these various circumstances, required a speedy investigation and dispatch. But the inferior courts n ere

newered to circumferibed in their parties therefore, and the parties of the common that the parties of the part

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The court of Exchequen indeed had very early drawn forme metvil actions between subject and subject; nor in the least telating to the revenue under their cognizance pand hotwithflanding the flatute of & Rutland, and the flatute of A Mr. ticuli fuper chartas, were evidently meant to prohibit them a in future from holding plea of any civil matter between the people, they retained the jurifdiction they had utwited in and defiance of them, by conniving at the complainants fathly Juggesting that he was a debton to the king which the plaintiff was not called upon to thew nor the defendantiallowed to dispute. But the Judges of the court of King's Bench had note from the particular jurisdiction profesibled to them, or the nature of their process which we have seen was calculated only for trefpaffer, an opportunity of teceiving complaint of any civil matter, or awarding procels against the defendant for it, unless it was alledged to have been committed with force, in breach of the peace; and therefore could not usurp an immediate jurisdiction over civil matters, as the court of Exchequer had done. Thowever it was not long before an opportunity offered itself of drawing an action, which was merely civil in itfelf, inder their cognizance; and their jurisdiction over that being once established, other schemes were foon devised to enthose orders of men who had formerly looked upon M agris an

and the common law had not provided an effectual remedy for many injuries which the progress and extension of commerce gave birth to a for the contracts made between merce gave birth to a for the contracts made between merce gave birth to a for the contracts made between merce affected by the non-performance of them ain a fugh adifferent manners, and fuch new and confequential adapted a that the legislature was forced to provide for early as the early of Edward the first, that, "Whensever from the needs of Edward the first, that, "Whensever from the needs of Edward the first, that, "Whensever from the needs of the early and the country that the legislature was forced to provide for early as the early of Edward the first, that, "Whensever from the needs of them and the country that the legislature was forced to provide the country that the legislature was forced to provide for early as the early of Edward the first, that, "Whensever from the register in one case a write that he found in the Chan-

Caules, aring from incle various circumstances, required

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Samp and in it like cale falling under the faine right; and street using blike remedy, no opercedent of a written sold street, take clethes in Chancery hall agree in forthing at the new one award if they cannot agree, it shall be adjourned to the mext pail among where a writt shall be adjourned by wonfent of the terned in the law staff it happen for the to future, that the terned in the law staff it happen for the configurate of this wind doing justice to the future. In comfigurate of this shall be deficient who had a variety of new writs were invented; and a future who had a variety of new writs were invented; and a future was competent, had a particular one made out for him the conding to the exigency of his own particular case. And the adtion sounded thereon was called a special intimate traspass and a case of the case of the continuous describes on the case of the continuous describes on the case of the continuous describes on the case of the course of the course

Oh this fort of action the court of King's Bench contended they had cognizance, and that the original wirit might at shorplaintiff so requelty be made verurmable; as well mi that churtwas im the Common Pleas p as the action was for a HFF passo of bubich they shad an "original Jurisdiction" and though not alledged to be committed with armis, yet 12" voured formuch of a ariminal nature, as to make the defendant diable to pay a fine to the king as well as damages to the party complaining 1911 Not contented with a participasion of all actions on obe cafe with the Common Pleas, the King's Black contrived alfor foon after to fliere with them in the actions of Debit Detime, Covenant and Meedum. But as these actions were merely civil in themselves, the cognizance thereof could not be obtained in the fame manner as the former, by procuring the original writ to be made retumable therew nor couldn't have been maintained (if it had beensattempted up for forplaufible a matther as the action of trasposition the cost as Southand to draw these into their court, they dweres obliged to refort to as fiction, fimilar to that adopted by the nourth of Exchequer, anthas Action was by fuffering the plaintiff, after having alledged a complaint of trespass against the defendant, [in order to give the court jutisdiction of waive his first charge of traffing, when the defendant was brought intoveourt, and declare against him for a debt, breach of contract of covenant, detention of his goods; for other matter of a mere civil hattire. To And to support this new jurisdiction, the Judges maintained, that whom a party was once brought linto court, and either in the actual or supposed custody of the Marshal, he could not be charged, even for any civil matter, elsewhere. By this doctrine, they not only got cognizance of that plaintiff's action who had caused the defendantito be apprehended,

but also of the actions of others who had liberty to charge him while he aremained in fuch: cuttody: And in order to found this inviduality of it was not needlary that the defend? ant be actually the Marfoal's prisoners for now, as foom as he appears, or puts in bail to the process, he is deemed orby to doing to be in fuch custody of the Marshal, as will give the courts a jurisdiction to proceed no lo having been for lemply adjudged, that if any person be in successful Ma reschallis Was be it by commitment, or by lotitet, s bill of Middlefex, or other process of law, it is sufficient to give the court jurisdiction of any matter referred to them and And the rather, (fays my Lord Cake) for that the count of Come mon Pleas is not able to dispatch all the subjects causes, sif the faid actions should be confined to that cours and and feeing none but Serjeants at law can practice in the court of Common Pleas, it is necessary, that in this court of King's Bench, apprentices and other counfellors of law mighty bie experience enable themselves to be called Serieants afterie wards; otherwise, Serjeants must want werpedience; which is the life of their profession." This acquired jurisdiction is now fully established. For lays the language searned writer, The proceedings in the court of King's Beach for to long time, and under to many honourable Indees and reverend Sages of the law, have gotten fuch a foundation as cannot, without an act of parliament, be thaken." Of such an act ever being passed, there is not the least probat bility, fince the Legislature has in several inflances, com-firmed its acquisition. Not indeed can such an add ever be thought of fince not only the smazing increase of causes; from a wide extended commerce, requires more than one court to investigate and determine them ; but the inconveniences formerly experienced by the frequent removal sof this court has long ceased to be apprehended, and the part nels; and find the fame justice done them on the one fide of Welninger bells as on the other saite dinnelle the

and support was only of such as were of another between subject and support of the court of King's Bench obtained a concurrent jurisdiction, and now holds, as it were a division imperium, with the court of Common Pleas, over all civil actions of a personal, and some of a mixt nature. Its original jurisdiction we have seen of causes between subject and subjects was only of such as were of a stortions nature, as all trespasses with armis, resour or bound-breach, actions of

be charged, even for any civil matter, elsewhere. By this doctrine, they not only got cognizance of that plaintiff's action who had squagar since does does do and use of apprehended, times

deceit, conspiracy, forcible entry, ejectment, replevin, and trespass on the case. Whereas its acquired jurisdiction, or rather that jurisdiction which is by consequence only, as being founded upon the defendant's being in the supposed or actual custody of the Marshal, comprehends all actions of contract, whether express or implied, debt, annuity, covenant, account, case for negligence, non-feasance, mil feasance, and molfinshare; for the grand and subdivisions of all which actions, bemust refer to the numberless abridgments and law tracts, not forgetting Sir Manthew Hale's useful analysis of the law, and that excellent analysis of the late Sir William Blackstone.

From what has been falt, the fludent will observe, that in fome actions of a perfonal and mixt nature, as trefpals, cafe, victiment and replevin, if the plaintiff would fue in the King's Bonds, he has his option either of profecuting them by the process of bill, of by original writ, made returnable therein. And indeed the actions of debt and covenant have been profecuted there by original; though it has been questioned, whether that court has cognizance of debt or covenant by original writ. But there feems to be little of no ground for fuch question now, fince it has acquired a jurifdiction over matters of contract; and therefore, why frould it not hold plea thereof as well by one species of process, as by another. 66 And the only thing that appears to have given rife to fuch question, is the unfrequency of profecuring thole actions there by original writ; which no doubt is owing to the fine taken by the Curfitors upon fuing out an original writ in debt and covenant for payment of money; the payment of which fine is avoided, if the plaintiff profeand the cause was ... Hid process of sill. was said the did the latter the phintil had blivery togake out farther

Resiductions, or pleas of land, when the plaintiff is driven to an action of an higher nature than an ejectment, continue still cognizable in the court of Common Pleas only, by writs of right, and formedon; as do all actions of quare impedit, dower, partition, and the like. To which court also must the parties refort to levy a fine, or fuffer a recovery, which are carried on under the forms and folemnities of a real action.

 charit, empirary, yorable entry, yourment, repleving and they was on whereast its adoptived in the fill of tather other jurified the tather that it is the confidence only, as being founded upon the defendants being in the improfied or is stead of each of the sense of the confidence of the sense of the contract of the confidence of the sense of the contract of the

The HOUGH the privilege of caling an afoign has also profession, and by fome particular performs, as Berry and Members of Parliament, who are privileged from arreless and therefore must be proceeded against in the old way, by summons and distress, it will not be improper to treat shortly of this privilege, which was formerly allowed in civil actions to all performs. But was it to be renewed, and become the usual practice again, the courts have declared they would interpose and prevent its occasioning that unnecessary delay of justice and inconvenience to suitors, which its formerly disk thingure has able to smooth and become

been profecuted there by wriginal; thought it has been In the court of Common Pleas, which on its oftablishment had the fole-jurisdiction of matters of a civil anature a the process was by fummons and diffres infinite, to compet the defendant's appearance, according to the usage of the common law. The theriff therefore, upon receiving the write was to fummon the defendant, which was done either peer fonally, or by leaving notice at his house; and sometimes in real actions, the warning was given on his lands by erecting a white flick on wand the Upon the fummons other defendant either appeared in or effigued sor made defaulte If he did the former, the plaintiff declared again whim; and the cause was proceeded in by the court's and it he did the latter, the plaintiff had liberty to take out further process against him. But if he essigned, that is leat an excuse to the court why he could not attend, be was to dend it by the texeture day of the furt towhich diche did it funther process did not iffue against him. Before every day of appearance in Banc, there was and filling a day called the efforgreday sting first return day of severy terms properly speaking his the first day of that termin and on that day the peak action, the court for the party to appear in and fave a

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¹ This perhaps is the reason why judgments in the Common, Pleas relate to the essign-day of the term; whereas in the King's Bench they only relate to the first day of the term.

courteded formerly to hi fand the cultim continues up this dayoud down the courted on the fufforestumbout the seems objet one of the Judges thereoff to the arther fuffigurar on described of such as did not appear according to the summons of the writ, in This day therefore terms to the summons of the writ, in This day therefore terms to the simple with the fuffigural as in sally actions with the seems to the summon of the object of the sally actions it was confidented at the following the most actions it was confidented at the following the most actions in the summon of the counterpart of the sally allowed in the sall the some montant the sall the sall

Effoigns were of five forts, vile forbitio Regis, bie terring fanctam, ultra mare, de malo lecti, and de mala veniendi, which was dalled the common efficients and fometimes the defendant was allowed to call more than one affaign or but this privilege was shon confined by statute; and some of the effigur who ly abolished. If the leffinger was regularly sent up by the vetural daysof the write and allowed by the court, it was entered on a roll, called the effigur-roll, kept by the clerk of the effigure, and thereupon a day was given the parties to the wext terms, and all further proceedings flayed in the mean time; for an appearance could not be entered in the fame term in which an excule had been fent priedante, by the adjournment of the effeign, the plaintiff had the fame day given himson the roll to appear in as the defendant had, and the court would not allow the defendant to scome in and plead in the labo fence of the plaintiff. But if the defendant tid not appear to the femmons, and neplected to cast an efform on theway day the writ was returnable, the plaintiff had sliberty no enter a nervelplatur with the elerbiof the effigure, interdence prevent an effoign being cast afterwards; and from this right of excepting to the effiger, the second day after the return of the writ was called the exception day. On the third; the free riff was required to return the writ into course which if the did, the fame was delivered to the unitor bresium to be filed and the court was then in possession of the cause withis day therefore was called the vitorna brotism days if he ment duy? which was the fourth from the return of the gwrith water called the appearance day, bor disc amoris, theing grantede sign gratio-by the court for the party to appear in and save in default, wIf therefore he had mot call an offeign and appeared to the action on the quarte wie postwof the veturn of the writ, the day on which the court fat for dispatch of their bufiness, it was held sufficient; for till then no furenter to de discovered To said aldings callimble considered and de social and social and

veWherever the rispine was warranted as the fill fequent prove cefe to the original, at a great delay of fulfite and inconve nience andle from the privilege of calting and affign, at bed came lufust soon the Sheriff to return take beighted write of courfe which nil babet indorfed, that the tapine might preferredly iffue, and the defendant be apprehended before he had are opportunity of ablconding, for which the fummons on the ariginal had but too often ferved as a notice, and a region!

fonctiam, altra mare, the make lection and de malo veniendi, which 1. If there were many defendants, and one cast an officing and the reft appeared at the return day, nin puchance of the full mons, the fame day was given over dothern as the aft faign of the co-defendant was adjourned to. I But if ithe other defendants did not appear long the fumptions, the fame day could not be given them over, and sherefore sin facts cale a refummons was necessary; which was awarded beturnable the same day! And if the effigure of ultra mare, with proitio Regis were cast, the plaintiff, by the course of the commonday, might denyift, and have a write out of Chancerys reciting that the tenant or defendant is not beyond Sta, of in the King's fervice, and commanding then Justices to proceed 3d Winereupon the effign was requalited . ad And by the hasute Westin, the first, c. 441 If the estaign of ultra mare be adjourned, and the demandant averred by the country, other the tenant was within the realm on the day of whelfummonsprand three weeks after, it turned to andefaulan a 13

prevent an effine being cast asterwards; and from this right of comprising a different to the comprising and the comprising the comprision of the control of

² Infil. 253 t Vide Bather's cafe.

When the court of Genman Pleas became flational van Westminster, such a great expense and inconvenience and to the parties from the law's requiring a perfonal attendance from time to time, in the Court, that it became ufully in att most every case, to apply for letters patent to appoint and Attorney; which, when obtained, were inrolled by the Clerk, now called the Clerk of the Warrants: But if they could not be had, the Litigants were obliged to come up to town, and abide there till iffue was joined. This inconvenience, however, was not of long duration; for the flatute of Westminster the second provided, " That such as " have lands in divers shires, where the Justices have no " circuit, that fear to be impleaded, and are impleaded of " other lands in shires where they have no circuit, as be-" fore the Justices at Westminster, or in the King's Benety, " or before Justices affigned to take affizes, or in any county before Sheriffs, or in any Court-Baron, may " make a general Attorney to fue for them in all pleas " in the circuit of Justices, moved or to be moved for "them, or against them during the circuit; which Attor-" moved during the circuit, until the plea be determined ed, or that his master remove him." By this statute, By this statute, the parties in all civil cases had liberty to appear by Attorney when once brought into Court, except they were infants or ideots. The first of whom, by reason of their imbecillity, if they fue, must fue by prochein ami, or guardian; but if they are fued, they must defend by their guardian for that pupole specially admitted by the Court. The latter of whom muft, in all cases, appear in their persons, and the Court will take care of their interests; because they have not discretion to enable them to appoint a proper subflitute to conduct their bufinels for them, But in all ain minal cases the party must appear in his own proper person.

The appearance by Attorney is by a warrant which was formerly given under the hand of the party, but is now entered of course, appointing him Attorney till the end of the cause, unless revoked.

When this warrant was brought into court, it was deal livered over to the Clerk of the warrants, to be filed and enquered of record. The authority hereby given, continues; till judgment obtained in the cause, and for a year and a day afterwards; and for a longer time, if the defendant continues in execution. After this statute, Attornies came to be a regular body of men, attending upon the Courts in which they were admitted to act, and had certain privi-

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Clerk, now called the Clerk of the Warrants: But if they could not be had, the Littgants were obliged to come up to rown, and abide there till flue was joined. This inconvanience, howevern twi 2 and arrangement for the fla-

tuce of Westmingles the second provided, "That fach as have lands and sold of lind as guitting to have no wireuse, the noist of the day of are impleaded of

By the common law, upon the appearance of the defendant to a fuit instituted against him, pledges were required from him for his due attendance in Court, from time to time, till the charge was investigated; and if he made default in satisfying the debt or damages recovered by the judgment, his pledges were answerable to the plaintiff. These pledges were originally (as was observed before) of the same decennary with the defendant.

A pledge was the common law term, in civil matters, fords that person who has long since been denominated a bail: Indeed, at this day, all forts of surenes, whether in criminal or civil cases, are vulgarly called bail; but formerly, there was a great divertity of names for those who were fureties for another, according to the nature of their stipulations, and the matter wherewith the principal party was charged; being called by the various names of pledges, bail, mainpernors, fidejuffers, sureties, and the like. For their true original nal difference and fignification I have not much inclination to fearch, as in our oldest law books Lord Coke fays*, there is great variety of opinions touching the matter, nor would an explanation of their diversity be now of any great service to the Student, were it to be attempted. However, as the recognizances entered into by bail in the Courts of King's Bench and Common Pleas, will be found to differ even at this day, it is necessary that he should know the occasion of it; which information I shall endeavour to give him, though, perhaps, in a very unfatisfactory manner.

A Pledge is faid to be, that person who undertakes or is surety for another f, and who plevies other things than the body of a man; and it seems, that a pledge had no power over the person of

^{*} Vide 4 Instit. 178. + 4 Instit. 180. 2 Instit. 19. Vol. I. d his

his principal, if he neglected to perform what the pledge flid pulated he should. As if the principal failed in his fuit, his pledges who stood security for the King's americament, were immediately answerable for it, when it was affected by the Coroners. So in replevin, when judgment irreplevisable was given for the avowant, if the Sheriff returned elongata to the writ de retorno habendo, the pledges pro retorno habendo were answerable to the avowant or sheriff; and the pledges for the prosecution, for the americament to the King. Upon no default therefore of their principal, could pledges lay hold of his person. But by Magna Charta, e. 8. it was provided, that "plegii debitorum non respondeant quamain ta-" pitalis debitor sufficiat.*"

Bail, is called in our law books, a living prison +; because, when one is arrested for a bailable offence, or is in prison for it, he may be bailed or delivered to others, who ought to keep him to be ready to appear at the time affigued, or otherwise to answer for him. Bail, therefore, have a power over the person of their principal, and may seize and keep him for their indemnity. Sometimes bail stipulate corpus pro corpore, at others in a sam certain, for the appearance of the party.

Mainpernors, are said to be those who take upon them to be sureties for another 1. And they differ from bail in this, that bail is always upon an arrest, whereas a person may be mainperned who never was arrested or in prison . Also, mainpernors are those who are found by plaintists in many cases; as where one sues an andita querela, or sure facias upon a release, &c. he finds mainpernors, and not bail, because he is plaintist. So in an appeal of selony, if the desendant wage battle, the plaintist shall find mainpernors for his appearance.

Fidejussors, are a species of bondsmen in the Spiritual Court, and are required in an obligation there with the obligor stare mandatis ecclesies: for the Spiritual Court does not take bail, but caution.

And furcties, are faid to comprehend all the former , and are required either by the common law, or by flature 1. By

P. C. 96. | 4 Instit. 179. \$ 2 Lev. 36. 4 Instit. 179. Hales
180. | 2 Instit. 40,

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the former, upon a writ of ne exeat regnum; and by the latter, upon the statute 34 of Edward the third, chapter 1. upon default of good behaviour, which, at this day, is called binding over to the peace.

judgment irreplevifable Having faid thus much of the species of bail, I shall proceed to flow the reason and occasion of the difference between the recognizances of bail in the courts of King's Bench and Common Pleas, In the King's Banch we must remember, that in order to acquire and support a jurisdiction over matters of a givil nature, that Court would not fuffer the defendant who was brought in either upon a criminal charge, or an offence contra pacem, to be taken out of the custody of their Marshal, or prosecuted elsewhere, even for a civil matter; so that, if any one had a cause of action against such person once brought into Court, and either in the actual or fupposed custody of the Marshal, the complainant was obliged to profecute him there, while he remained in such custody? In all cases therefore, when the defendant was actually arrefled, whether upon a real or fictitious charge of having committed a trespass, if the Court admitted him to bail, his bail stipulated as well for his forthcoming to answer that charge for which he was arrested, as to answer all other persons that should come in against him, pending the investigation thereof, and sue him by bill; and as the process was only for an injury which could be recompensed by damages; and it being uncertain what was the true cause of action, or what damage the plaintiff might prove, the bail were bound in no certain tum, but only engaged that the defendant should pay to the plaintiff whatever he recovered, or render himself to the Marshal, or that they would farisfy the damages if he did not. But if the defendant was brought in upon a charge of felony, or upon a capias utlagatum in a personal action, which the King's Bench could hold plea of, and admitted to bail, he was bound in a fum certain, and his bail flipulated corpus pro corpore.*

The recognizance in the King's Berch in civil matters, when the party was arrefted upon the bill or the latitat, was therefore always general; but by the judgment, was to be reduced to a certainty. And the reason of its being general, was, that the defendant was apprehended for a trespals, and not for a certain debt or damage expressed in the process; and the bail were answerable for his appearing to, and

^{*} Vide 4 Instit. 179.

fatisfying all other actions that should come in against him. Whereas in the Common Pleas, when the defendant was brought in by the capias, and the Court admitted him to bail, they were bound in a fum certain, with a condition that the defendant should satisfy what was recovered, or render himself to the Flect, or upon his default that they should pay it for him. - In this court, the recognizance could always be in a fum certain, becaufe a certain debt or damage was expressed in the writ, and the bail only stipulated for him in that action. And when the capias was afterwards extended to other actions than those committed with force, if the defendant offered bail, they were bound in a fum proportioned to the debt, damage, or demand expressed in the original. So when it became the practice not to take out the original at first, but instantly issue the capias, the recognizance was taken according to the damage expressed sould have produced two or more of his friendly, who

It feems, that the diffinction between common and special bail took place very early; for Sir Edward Coke cites an entry of bail in the twenty-seventh year of King Henry the third, † coram Rege, in these words, "H. P. captus per "querimoniam mercatorum Flandriæ et imprisonatus effert domino Regi Hus et Haut, in plegio ad standum recto, et ad resis fondendum prædictis mercatoribus et omnibus aliis qui versus "eum loqui volucint, &c. §" Of these words, Hus et Haut, (says † Sir Edward) two French words, hus signifying an elder-tree, and haut the staff of an halbert, &c. I leave the conjecture that some have made thereof to themselves; we think it was then common bail now changed to Do and Ro, and the rather for this word offert. And it is observable, that then putting in bail at one man's suit, he was in custodia Mareschalli to answer all others which would sue him by bill; and this continueth to this day." This conclusion of that eminent Lawyer is certainly fairly drawn from

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A Coram Rege Rot. 9. This entry of bail must have been either in the Aula Regis, or in the Court which assumed the name of the King's Bench, because the entry is coram Rege.

§ This was clearly an entry of bail, and not maintrize, for

This was clearly an entry of bail, and not mainprize; for two reasons, first, because of the word captus which shows that the defendant had been arrested; secondly, for the words omnibus aliis as the bail engaged to answer all others, which mainpernoss did not; for if a man was mainperned, another could not file a bill against him, as when he was bailed. Vide 4 Institut 180.

^{1 4} Instit. 72.

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the above entry, fince he gives the etymology of the words hus et haut; thereby clearly proving that they were not the names of actual living persons, but of inanimate things. It is not improbable, therefore, that as the admitting a defendant to bail was entirely in the discretion of the Court, they gave the defendant his liberty, when the matter wherewith he was charged in the bill filed in Court appeared to be of a trivial nature, upon giving in any indifferent names for mere form take, as his pledges or bail. And his conclusion becomes the more reasonable, when we consider that as this court was ambulatory and followed the King in his royal progresses, it might happen, that the defendant, when apprehended, had not real and responsible persons always at hand, to offer to the Court for his bail; and to have kept him in custody upon a mere charge of trespals [which in reality he might not have committed] till he could have produced two or more of his friends, who, perhaps, he must have brought from a remote part of the kingdom, would have been oppressive, and against the spirit of the great charter, expresly declaring, that "no freeman shall be taken, nor differzed, nor outlawed, nor exiled, nor destroyed in any manner; nor will we pass upon him, nor condemn him, but by the lawful judgment of his Peers, or by the law of the land." In like manner the Common Pleas made a distinction between common and Special bail, allowing the former, in cales where the defendant voluntarily appeared to the process, or where the damage expressed in it appeared to be but of a trifling amount, and requiring the latter only, when the plaintiff's demand or the damage he had suffained appeared to be something considerable. In time therefore, in common cases, every desendant took the liberty of offering John Doe and Richard Roe, for his bail, who were regarded by the courts as sufficiently responsible for the due attendance of the defendant, till the matter could be investigated.

The admitting a defendant to bail was entirely in the discretion of the Court; but in civil cases it was never denied, if he tendered responsible sureties. In most criminal cases, bail was also admissible; for, by the common law, when the party was apprehended for any offence short of bomicide, the was bailable even by the Sheriss; and if it was refused, a writ de manucaptione lay, to order the Sheriss to

^{1 2} Inftit. 42. H. P. C. 47.

admit him to bail : or if he was acculed out of malice, he might fue out a writ de odio et atta; upon which; ah ena writ de homine replegiande, or writ of habeas corpus, fay to progure him his enlargement; till by the flatute Wellininfler the firft, and other fublequent ftatutes, Sheriffs and inferior Magistrates were restrained from admitting to bail, persons apprehended or committed for other criminal offences therein particularized, thort of bomicide. These writs, however, only lay to procure the party's enlargement when he was not detained by process; therefore they lay not when he was arrested by bill, latitat, or capias; so that the Sheriff was not obliged to take bail of one arrested thereby, but was commanded to detain him till the return day. But notwithstanding the express command to detain him, it was optional in the Sheriff to take bail or not in such cases, though no compulsory writ could be sued out for that purpose; but if he took bail, and the party did not afterwards appear, the Sheriff was answerable. For by the flatute Westminster the first, c. 15. and the writ de bomine replegiando, it appears, that a man, detained in prison, by the special command of the King, that is, by process out of a Court of Justice, + [for the King can commit to prison only by his justices] shall not be delivered to bail by the fheriff. As this flatute only restrains Sheriffs, Gatters, Ec from admitting to bail in certain cases, it has been held, I that it does not extend to the Superior Courts, it being a rule in law, that the authority of the superior cannot be confined or circumscribed by mention only of the inferior; and therefore, the King's Bench to this day may bail in all cases whatever, even for treason or murder, the arreft and detention of the enorgement and

The admitting a prisoner to bail, was a matter so much of course, when the defendant was apprehended and brought into Court, that all the Marshals of the King's Bench, [for in old times there were many attendant upon that Court under the Earl Marshal of England took upon them to take bail of persons in their custody. But feveral outrages having been committed by them after their enlargement, and it being usual for them to lay in waiting by the road fide, in order to kill and abuse their

to the King. And therefore, till hund * Inftit. 187. F. N. B. 66. E. 2 Saund. 60.

² Inflit. 185-6. H. P. C. 98. 90. 104. a. 1 Bulfer. 85. 2 Jin. 210. Latch. 12. Sti. 116, 418. 2 Jon. 222.

accusers. The statute 5 Edw. 3. 6. 8. ordained, that "enditees and appellees of felonies, robberies, and theft, shall be securely kept in prison according to the charge; and that if any Marshal offend, on come plaint made by any one, the Justices shall do him right during the terms: And that the Marshals shall choose before the justices, before they depart the places, in what town they will keep such prisoners, at their peril; and that they shall hire houses for that purpose, and not suffer them to go wandering abroad, neither by bail nor without bail; and that if they do otherwise, they shall have half a year's imprisonment, and be at the law."

cafes, though no compulsory wint could be fued out lot that purpose Times and and party did not

but was commanded to detain him till the return day.

it was optional in the Sheriff to take ball of not in luch

Of the Extension of the Capias to other Actions than those committed vi et armis. those committed vi et armis.

THE process of capias which we have seen only lay in actions vi et armis, and only then as a process of contempt in disobeying the writ of attachment, was found of such excellent use in bringing the desendant to answer a charge made against him, as by such process, if he did not appear, or could not be arrested, he might be prosecuted to "outlawry; that we find it at different periods authorized in other actions than those accompanied with force. But before it was absolutely given as a process in actions merely civil, the arrest and detention of the body of a desendant in some actions of a civil nature, was authorized by statute. For when commerce began to extend itself, and the lower classes of people engaged themselves in trade, their residence was not so certain as persons employed in agriculture and farming, their property in a continual studiustion and hazard, and difficult to be ascertained or discover-

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Outlawry is putting a man out of the protection of the law, so that he is incapable to bring an action for redless of injuries; and it is also attended with a forfeiture of all goods and chattels to the King. And therefore, till some time after the conquest, no man could be outlawed, but her selany: But in Bracton's time, and somewhat earlier, process of outlawry was ordained to lie in all actions for trespasse will some in. Ce. Lat. 128.

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were obliged to trust more to the honour and character of each other, than have regard to any apparent substance or property, and to look for the payment of goods delivered, or monies advanced in the course of their dealings, and satisfaction for breaches of contract, from the person, rather than expect them from the estate or realty of their debtors, which might amount to little or nothing at all.

The first statute authorizing an arrest and imprisonment for a civil matter not committed with force, other than by the process of capies, contrary to the common law and Magna Charta, is the statute 52 Henry the third, c. 22. which enacts, "That if bailiffs, which ought to make account to their lords, do withdraw themselves, and have no lands nor tenements whereby they may be diffrained, then they shall be attached by their bodies; so that the Sheriffs, in whose bailiwick they be found, shall cause them to come to make their accounts." This flatute was foon after followed by the 13 of Edw. 1. c. 11. which ordains, "That when mafters have affigned auditors to take their accounts; and their fervants, Bailiffs, Chamberlains, and receivors are found in arrear, their bodles " shall be arrested; and by the testimony of the auditors, ff shall be fent or delivered to the next gaol, &c." After which, the beneficial statute of merchants, the 12 of Edw. 1. flat. 3. c. 1. for the fecurity of merchants who have lent goods or money, gives the remedy of a flatute-merchant, and enacls, "That if the debtor do not pay at the day affigned upon coming before the Mayor, and proving the debt of and statute acknowledged, he shall cause the debtor to be 55 taken and committed to prison till he hath agreed to the and if the debtor cannot be found, then, upon a certificate into Chancery, the Chancellor shall award a "F writ to the Sheriff to take his body, and fafely keep him " till he hath agreed to the debt; and within a quarter of a year his chattels to be delivered to him, and his lands " and tenements fold, &c." Hut this flaunce was allo

As the above statutes only reached Accomptants and debtors by statute-merchant, the 25 of Edw. 3. 2. 17. provides, "That such process shall be made in a writ of debt, "and detinue of chattels, and taking of beasts by writ of "capias, and by process of exigent by the Sherist's return, as is used in a writ of account." Then the 7th of Henry the 5th, "Authorized the process of capias and exigent as

Stinetrespals, against him that maketh and publisheth *falle 66 deeds, "- After which, the flatute ro of Heavy 7. c. o. reciting of That forafmuch as there hath been great delays 55 in actions of the cafe, that have been fued, as well before 44 the King in his Bench, as in his Court of his Common Bench; because of which delays, many persons have been so put from their remedy, enacts, That like process be had " hereafter in actions upon the case, as well fued as hanging, " as to be fued in any of the faid Courts, as in actions of " trespass or + debt." Lastly, the statute 23 of Hen. 8. c. 14. after reciting, "That foralmuch as there is great delay in actions of trefpals brought upon the statute of Richard the fecond, made in the fifth year of his reign, against them that make entries into any lands or tenements, where their entry is not given by law; and also in actions of annuity, 55 and covenant, because there lieth no process of outlawry in such nature of actions; for reformation whereof en-16 alls, That like process he had hereafter in every action from henceforth to be brought upon the faid statute anno quinto, as in a common action of trespals at the common " law; and that also the like process he had in every writ " of annuity and covenant hereafter to be fued, as in an " action of debt.

By these statutes we see how the necessity obtruded itself on the Legislature, as the country was becoming commercial, of giving a better security for credit than the Common Law had provided. For in no civil case was the person of a defendant liable to an arrest, or imprisonment at the Common Law; the writ of distringus ad infinitum being the only process to compel an appearance to the action, and the writs of levari and series facias to give the plaintist execution of judgment obtained by him. So that for nothing short of a criminal offence, or breach of the peace, was the person complained against in any case liable to undergo an imprisonment. The

^{*} But this statute was altered by the 5th of Eliz. c. 14, and the offence since that has been made felony by the statutes 2 & 9

[†] Before this statute, it is worth remarking, that a practice had prevailed in the Common Pleas of conniving at the plaintiff's declaring for a less forcible injury, or other matter, after having brought the defendant into Court, by virtue of an original writ of quare clausum fregit for breaking his close; and capias thereon awarded. Which practice seems to have been borrowed from that of the King's Kench.

reason why the Common Law subjected only the personal effare to the payment of debts was, that it confidered the money lene, or thing advanced, no other than a chattel, and therefore it made no other than chattels liable to the difcharge of it *. 101 And in early times, men trolled one another no farther than they had visible chattels and apparent subfrance to answer the debt, which could be easily known where they refided. Nor was the law in this respect in the least altered till a long time after the conquest; but the revolution that took place then, exempted the person and lands of a debtor from process of a civil nature, for reasons very different from those of the Common Law. For according to the feudal system, neither the lands nor person of a debtor were liable to his debts; because the former were answerable for the duties to his lord, and a new tenant could not be en-Forced upon him [which if lands had not been exempted, would have been the case] without the lord's consent to the Mienation; And the latter was obliged, if called for, to atend the king in his wars, and when at home to ferve his ford according to the nature of his tenure. Neither the one not the other, therefore, were subjected to the payment of debts, the laws being framed for a nation bred to warlike atchievements, and which was to extend its power and fame by arms. But when, upon the introduction of commerce, the people of necessity began to contract debts with each other, and when the great charter gave the tenant liberty to alienate his estate without acquainting his lord, provided he retained fufficient to answer the duties to him, it was feen towards the reign of Edward the first, how easy it was for any one to procure personal wealth upon credit, and then purchase lands With it, and thereby not only defraud his creditors, but against all reason and equity, enjoy the profits of that estate, which he had bought with another's money. The prevalence of this abuse called for the interference of the Legislature, who in that reign, contrary to all feudal principles, allowed the charging of lands in a Statute-merchant to pay debts contracted in trade. In the same reign also another innovation on the feudal law, for the benefit of trade and fecurity of credit took place, by granting execution after a recovery of a debt by law, not only upon goods and chattels, but upon lands also by writ of + elegit. But as this was only a process of execution, it was by no means a sufficient proventive of the mischief, as trade gave an opportunity to men to incur debts,

and they had neither occation to incur o

^{*} Plowd. 440. 3 Co. 11. 2 Instit. 19.

who had neither chattels nor lands to fatisfy them. And as the original switt and attachment had but too often ferved as a notice for fraudulent debtors, to fcreen themselves from the jurisdiction and coercion of law, or secrete their effects while the fuit was depending, and fo leave their creditors without remedy, it was found that nothing but the extension of the capies with its confequential process of exigent to actions of deht, and detinue, as well as to actions of trespass vi et armis, was at all likely to give effectual relief, and overtake fuch knavish and dishonest evasions. From these civil actions, and that of replevin, it was further extended at different times by the statutes before mentioned, to the actions of trefpals on the case, annuity, and covenant. And the reasons which the Legislature has from time to time given for authorizing the arrest of the body of a debtor, sufficiently evince the neceffity that there was for it. For the preambles of all the foregoing statutes either suggest that accountants for the most part had no land or tenements whereby they might be distrained, or that the process by distringus was so dilatory, that many were deprived of their remedy, or that debtors had an opportunity given them of avoiding their creditors demands, because there lay no process to outlawry.

From these words it is plain, the intent of the Legislature, in extending the capias to civil actions, was to prevent impolition and fraud, and a debtor's attempts to fcreen himfelf, and make away with the property of those with whom he had dealt. And when we confider the continual fluctuation of the property of persons in trade, which more nsually confilts of chattels, than of lands or tenements, the frauduleut concealments to which personalty is always from its nature liable, the instability and unsettledness of traders, and above all, when we consider the numberless inlets which commerce affords for the practices of dishonesty, we cannot but think it just, that creditors should have a better security, than a chance only of recovering fatisfaction from the effate and effects of their debtors, by a process both dilatory and expensive. The writ of distringuis, the Common Law process to enforce the defendant's appearance to a fuit, was wifely calculated for that end, when agriculture was almost the only employment of the middling and lower classes of people, when their property confifted of lands, tenements, and implements of husbandry, when their residence was certain, and they had neither occasion to incur debts nor opportunity given them to avoid payment thereof by leaving the kingdom, and flying from the reach and coercion of law. For then repeated diffresses, as they operated to a total prevention

of procuring a livelihood, and fatisfying the lord for his rent, were the most probable means of compelling the defendant's appearance to an action instituted against him. But when personal wealth became more confiderable, by the gradual advancement of trade; and men found other employment than agriculture, and an intercourse was opened with foreign countries, how eafy was it to have incurred debts, and left the kingdom, not only to the diffress and rain of the individuals who had trusted them here, but to the enriching of other countries with the manufactures, and produce of England, the persons, industry, and wealth of its fubjects. That a creditor therefore should have a power to arrest the body of his debtor to prevent his absconding, and thereby either enforce the immediate payment of his debt, or have a temporary fecurity for it till fuch time as he can establish and prove it, is certainly just. Nor are the statutes authorizing the arrest in civil actions, to be regarded in the manner some fanciful men of late have regarded them, as fo many laws arming the people with powers the most dangerous and unconstitutional over the persons and properties of each other: but as laws modifying old ones, grown useless and inefficient, and calculated for the benefit of trade, security of credit, prevention of fraud, and facilitation of justice. brought

Great revolutions in manners and in property necessarily occasion as great revolutions in the government of a nation. Laws framed for a people almost in a state of primæval fimplicity, are not fuitable for them when emerging into a state of civilization, engaging in the cultivation of arts, manufactures and science; and deriving the consequential advantages of power and riches from the exertions of industry, and extension of commerce. If no better fecurry had been given for credit and due performance of contracts than the antiquated process of distringus, which was by no means calculated to reach the arts and subtilties too apt to introduce themselves with the luxuries and refinements of fociety, that commerce, in all probability, which has been cultivated to the envy and admiration of the world, might have been nearly strangled in its birth. For as traders in their mutual dealings, must always have a greater reliance on the industry, honour, and character of each other, for the discharge of debts and performance of contracts, than expect fatisfaction in case of failure or neglect from landed estates [which the far greater pare of them have not what process, but a process against the person, attended with the terrors of imprisonment,

ment, or confequences of outlawry, was so like to make men cautions how they incurred debts without a competent fund to repay them. And where is the hardship, inconvenience or injustice, in the laws authorizing the arrest of the person, modified as they are by subsequent statutes? For if a man will contract debts, and has a sufficient sum to discharge them, and will not, it is a species of dishonesty in him; and if arrested, the prison, in such case, is of his own seeking, and he ought not to complain.—If at the time he contracts them, he has no fund, his dishonesty is the greater, and his murmurs ought not to be heard.—And if upon the arrest he goes to prison, and cannot procure bail for his appearance to the suit, it undoubtedly argues not only a great mistrust of his character and suspicion of his poverty; but shews, that he has deceived his creditor by false glosses and appearances, which he could have assumed with no other view than to cheat and defraud him.

That it was reasonable and just a creditor should have a liberty to arrest the person of his debtor, no stronger angument can be adduced, than that the courts of Justice had connived at it, long before it was authorized by statute. For, in the King's Bench, we have feen it foon became a practice for plaintiffs to take out a bill, or latitat, as if for a trespass; and when the defendant was thereby brought into court, to declare against him in debt, or the like action of a mere civil nature. So too it was customary in the Common Pleas, before the statute of Henry the seventh warranted the capias in actions on the cafe, for the defendant to be arrested as if for a trespass vi et armis, when the plaintiff's real cause of complaint was for a less forcible injury. Which, fictions, as they evidently tended to the expedition of justice, serve, among many other instances, to illustrate that maxim of law, that in fictione juris confisit contracts than the antiquated process of diffrances, whith

The law of arresting for debt therefore, was not only occasioned by the change of manners and circumstances in the country, but was founded on strict justice and right. And that it should be objected to at this time of day is not a little surprizing; since the Legislature has amply provided against the inhumanity of creditors, and the oppression of unfortunate traders, by exempting them from the rigour of the general law, by the statutes made in favour of bankrupts. For, by these statutes, a creditor is compelled to give his debtor his personal liberty, upon the latter's cef-

fich of this whote effate to be divided in proportionable frares amongst those with whom he has contracted debts in the way of his trade, and whom he is rendered unable to bay from Aidden and unavoidable acoidents.ws True it is indeed, that in other debtors, but those who have contracted debts in the way of their trade are exempted from the hardships of imprisonment by the bankrupt-laws; nor would it beinght, that debtors of any other description should have claim to a fimilar indulgence, in For what greater encouragement could have been given to prodigality and diffipation than by extending the provisions in them to any but actual traders-fince that let of men are the only perfons liable to those accidental losses which claim commiseration, and to an inability of paying their debts without any fault of their If persons in other situations of life will run into debt without the power of payment, the Legislature has wilely left them to take the confequences of their own indiscretion; the law holding it to be an unjustifiable practice for any one but a trader to encumber himself with debts of any confiderable amount. And if the Legislature had not been exceedingly cautious, and extended the benefits of the bankrupt-laws to none but actual traders, and to those traders only who are considerable enough in their dealings for their creditors to demand a distribution of their effects; what an opportunity would have been afforded for men to have assumed the character of traders for a while, procure credit from the unwary, and by a fraudulent concealment of their property, and elopement of their perfons, to have rioted in the spoils of their creditors; or after wantonly wasting the substance of others, to have come in and claimed the privilege of bankrupts, and exemption of their persons from imprisonment, when they had nothing left to distribute. e had not tufficient let

It should therefore be recollected by those who wish for an abolition of the laws authorizing the arrest of a debtor, that they do not extend to the oppression and imprisonment. of any one for whose well-being and livelihood the contracting of debts is both justifiable and necessary; but only to the discouragement of prodigality in those who incur debts without necessity, or a prospect of paying them; or elfe feek to avoid the payment of them by means dishonest and unjust. Such persons should find no advocates in this country to exempt them from an imprisonment which they voluntarily draw on themselves, and is the consequence only of their indifcretion or fraud; and especially since the Legislature (perhaps too frequently) releases them from their confine-

him leave to retain that which he had

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confinement by ngenetal acts of infolhency of all fay in this country because amongst a strading people, whose power and credit must rife for fall according to the encrease or decay of trade, the laws ought to afford every fecurity to contracts. And that can only be done by making not only the effects of debtors, whether in lands or in chattels, but alfo their persons, liable to the fatisfaction of their credit ors. No man therefore who is well acquainted with trade, and wishes for its prosperity, can seriously hope for a repeal of laws, which the wifdom of our ancestors has at different times provided for its fecurity. And it has been observed, that the farther all new plans for protecting creditors have departed from the laws authorizing the arrest of a debtor, the more impracticable, and even pernicious, the attempts have always bitherto proved. all radio ni enoling il debt without the power of payment, the Legislature ha

When trade was advancing in the Raman Common-wealth, the first laws made against debtors were fanguinary and inhuman; the last too lenient and futile. Those of England have wifely fleered between both extremes, and have provided at once against the inhumanity of creditors, and prodigality of debtors. As they are, they feem well adapted to the situation of the country and manners of the people, To alter them would be inconvenient and dangerous, to abrogate them would be accelerating ruin and bankruptcy. The law of coffic bonorum, introduced by the Christian Emperors, in the politer age of the Romans, and which our bankrupt-laws fomewhat refemble, whereby, if a debtor yielded up his fortune to his creditors he was secured from being dragged to a gaol, was reasonable and just ... But when that law was farther extended, and not only exempted every debtor from imprisonment who would swear that he had not sufficient left to discharge his debts, but gave him leave to retain that which he had in his possession; it feemed, as a late learned Judge and Commentator on our laws has observed, to be a law, which, under a false notion of humanity, was fertile of perjury, injustice and abourdity. The establishment of a similar law in this country. then (as some innovators seem inclined to attempt) would certainly not only tend to the ruin of trade, and diminution of credit and confidence amongst us; but be a further encouragement of that fraud, dishonesty, and perjury, which we daily fee with concern, and introductory of more of these knowish contrivances for the supply of dissipation and gaiety which the laws already in being are neither able to checkinor prevent and and and effection notice indicated to

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profituted to authorize tyranny. Hozeft and industrious men, by reason of process against their persons, without knowing of ach THOLE MARTER ARTHOLE of latisfaction made of them, were frequently torn from their homes, to the Africas de of Asynth adt noun lies gniving Oma-

lies, then carried as speciacles through the country, and it I the bill and latitut of the King's Bench, and by which B that court had gained cognizance of personal actions; and by the capias, and its subsequent process from the Common Pleas, which had been either given by Ratute, or had become, by connivance of the court, the usual process in civil actions; the sheriff, we have seen, was commanded to arrest the party and detain him till the return-day, however minute or trivial the cause of action might be. So, great an advantage given the fuitors of the fuperior courts, though justice and necessity called for it at first, was foon employed as an engine and means of oppression. For as the courts did not require the real cause of action to be shewn before process was awarded to arrest the defendant; but suffered a plaintiff, upon a general allegation of trespass, to fue out either of the above writs to prevent his abfconding, a defendant was frequently arrested, and lodged in gaol, when there was little or no cause of action against him; and often underwent an imprisonment from the spite and revenge of a neighbour who had nothing to charge him " fulficienc within the country where fuch perions be diw

The extension of the bill and capias to almost every case, were also notable engines of oppression in the hands of undersheriffs, bailiffs, and their followers, to work with; as they had an opportunity given them to extort money or effects from those they had arrested, upon granting them the least trifling indulgence. Of which extortions the parties dared not complain, for fear of being feverely dealt with while in their custody. This abuse was in some measure prevented by the statute I of Henry the 5th, which provides, " that those which be bailiffs of sheriffs by one year, shall be in no fuch office by three years next following." But this did not give sufficient relief; for the greatest oppressions were felt from the bailiffs employers, as it was customaty for theriffs [their office having become exceedingly troublefome] to let out their bailiwicks to farm, whereby mean and illiterate persons crept into that important flation without proper authority. Every kind of outrage and oppreffion was committed by these miscreants, under the fastelion of law. The means of justice were shamefully abused, and the King's writs, and names of the Judges, scandalously proffituted

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profituted to authorize tyranny. Honest and industrious men, by reason of process against their persons, without knowing of any action commenced, or demand of satisfaction made of them, were frequently torn from their homes, to the loss of their reputation, and distress of their famalies, then carried as spectacles through the country, and it the hazard of their lives thrown into a dangeon. Of they had property, were gradually stripped of it, and thereby of the means of defending the suit, by the scandardous extortions of these farmers of bailiwicks, and gravities to their bailists and goalers for ease and temporary enlargements from prison.

Such flagrant abuses of the law called aloud for the interpolition of the Legislature; but they were not perfectly remedied till the flatute 23 of Henry the firth, c. 9. by which it is fordained, "That no Sheriff, Er, thall hereafter let out his bailiwick to farm." The fame statute allo regul lates and fettles the fees payable upon arrefts and artache ments, and further provides, " That Sheriffs, and all other " officers and ministers, shall let out of prison all mannet " of persons by them or any of them arrested, or being in " their custody, by force of any writ, bill, or warrant, in " any action personal, or by cause of indictment of trespats, upon reasonable sureties of sufficient persons, having " fufficient within the counties where fuch persons be fo let to bail or mainprize, to keep their days in fuch place " as the faid writs, bills, or warrants, shall require, fuch person or persons which be or shall be in their ward by " condemnation, execution, capias utlagatum, or excommunica-" tum, furety of the peace, and all fuch persons which be or " shall be committed to ward by special commandment of any juf-" tice, and vagabonds refufing to ferve according to the form of " the flarutes of labourers only except." It then ordains in what manner Sheriff's bonds are to be taken; and that Shetiffs shall make yearly a deputy in the King's courts of Chancery, King's Bench, Common Pleas, and Exchequer of record, to receive all their writs, warrants; &t. . Rashon mi ad

By this falutary ftatute which was made in affirmance of the common law, all persons arrested upon mesne process had a liberty of getting themselves discharged upon finding bail to the Sheriff, as he was obliged to take bail if the sureties tendered were sufficient. But though it tended greatly to the case and benefit of desendants, by exempting them from the rigour of an imprisonment before the debt of damage was fully proved to the court, yet it Vol. I.

IXXXII INTRODUCTION

often bore exceedingly hard upon plaintiffs, Sheriffs, and other officers of franchifes, having the execution of proceeds—So difficult is it in the Legislature to take a butthen of the shoulders of one, without imposing it on the loins of another.

when called upon to return the writ; in fuch cafe. The inconveniences brought upon plaintiffs, in confequence of this statute, were these. If the defendant, when arrested, had given a bond, with sureties, for his appearance to the fheriff at the return of the writ, and then neglected to appear, the plaintiff was not only delayed in his fuit, but driven to the necessity of proceeding against the Sheriff, unless he gave up the bond he had taken to the plaintiff, that he might profecute the bail for the penalty, on account of the defendant's default. But even if this were done, the plaintiff was often foiled in his remedy. For in the first place, he could not arrest these bail, but only ferve them with process to appear; because, if he could have arrested them, it might have caused bail upon bail ad infinitum, which the courts would not endure. And as he was obliged to ferve them with process, the bail had an opportunity of ablconding, or concealing their effects, before the bond could be put in fuit, and judgment thereon obtained against them. In the second place, if the plaintiff accepted the bail-bond from the Sheriff, [as he was obliged to profecute it in the Sheriff's name the Sheriff might have released the action; and then the plaintiff, if he would proceed against him for so unfair a transaction, was under the necessity of applying to a court of Equity for relief, having none pointed out for him in law, as w

But if the defendant did not appear at the return of the process, and the plaintiff refused to accept the bail-bond from the Sheriff, the way to proceed against the Sheriff was, for the plaintiff to take a rule out of the court in which he had commenced his action, for the Sheriff to return the writ (if he had not already returned it) in which cale the Sheriff got himself into difficulty. For he was either obliged to cause good and sufficient bail to be put in above to the fuit; which if he did the plaintiff could not be damnified : or else he laid himself open to process against himfelf. As he must either have made a true or a false return to the writ, or made no return at all. If he returned the writ truly with a cepi corpus, an order went forth for him to bring in the body pursuant to his return. Now, with this order he could not comply, for he had let the defendant at large, and could not take him again, as the writ

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was spent and returned. 9 When the time therefore given by this order was expired, the plaintiff might movesthe courte for an attachment against him which was a criminal pros ceeding for his contempt in not bringing in the body pure fuant to his return of having arrested him. - If the Shelo riff, in such case, when called upon to return the write upon the defendant's neglect to appear, made a false return to it, as non of inventus, when he had actually arrested the defendant, and ler him at large without bail or might have arrested him, he made himself liable to fatisfy the plaintiff's whole debt in an action against him for such falle return 1.2 Or if he made the falle return of languidus that the defendant was fick in prison; or, cepi corpus, and on fervice of a rule to produce the body; he made himself liable to fatisfy the plaintiff. So that the Sheriffy when the defendant had been released after the arrest, without giving bail, and did not appear, must either have made such a returneds at once subjected him to an action, or an vato tachment. But if the Sheriff did not return the writtat abb into court, when lerved with a rule for that purpose, he was liable to an amerciament. And fiere the courts made as diffinction in the punishment of the Sheriff in the two cases of tontempt for that of not bringing in the body according to his return of cepi corpus et paratum babes made to the writ, and that of not making any return at all to its In the fift case an attachment lay against him; because of his disobedience to their order, which was a contempt of the court, as a court. But if no return was made to the write then they amerced him : because, by the statute, the Shew riff was compelled to admit the defendant to bail; and therefore if he was mistaken in his fureties, he ought not to fuffer in his liberty; and it might not be in his power to bring in the body which he was obliged to bail-But the returning of the writ was in his own powerd isad and more

The method of proceeding against the Sheriff in case of his neglect or refusal to return the writ, prescribed by the Statute Western the second, ch. 39 by issuing a writ judicial to the Judge of assize, to enquire into the delivery and execution of the writ; before taken notice of, by this time had fallen into disuse, and the practice of ruling him to read things about our open into the last and to be much as a state of the second of the practice of ruling him to read things about our open into the last and the last and

No action lay against him for a return, though false, if he had taken security. But if upon the arrest he let him at large again, without bail, the Sherist was not aided by the statute. Vide Gilb Hist. C.P. 22.

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INTRODUCTION. lxxxiv

turn writs, and then proceeding by attachment or amercement, as the cafe warranted, came in the dead poor of the country and of a refene, the plaintiff may either bring an action on the

The mention of this statute again, occasions me to fav fomething of another clause of it *, made to provide against any future refiftance to process "For in ancient times they had caftles, fortresses, and liberties, whereby they were enabled to refit the Sheriff in doing his duty no The inconveniences and obstructions to Justice were forgreat by occasion of them, that this Statute authorized the won onittas writ by Sect. 12. in cafe of the Bailiff's contamaog: And by Sed 22. to prevent Sheriffs from returning a refere to the writ, expressly ordered him, in case of refiftance, immediately to raise the posse comitatui, and go in his own proper person, ad faciendam executionem, et si inveniat fubballives mendaces puniat eos per prifonam, &c. et fi forte Vicecames cum venerit, resistentiam venerit, certificet variam de nominibus refishentium, auxiliantium, Sc. et per Breve de Judicio attachientur per corpora ad veniendum ad curiam, et fi de hujusmodi refistentia convincentur, puniantur, secundum qued domine Regi placuerit, e judicium parium fiorum, vel per legem terra: "in&

one part of the law of the land to commit for contempts; 2 Notwithstanding the words ad faciendam executionem, the Judges, in old times, construed this statute to extend to all process, whether mesne or judicial, and therefore would not allow the Sheriff to return a rescue to a bill, latitat or capies ad respondendum. But since the case of May and Proby +, a return of a rescue of one arrested on mesne process has been held to be good; and the reason on which such determination was founded, is, that anciently every man in his decenna had bail, and is now prefumed to have fureties ready to answer for his forthcoming: fo that it is not probable he will make any refistance, especially as he cannot know when the Sheriffs will execute the writ. The Courts therefore now hold, that the Sheriff is not bound to take the poffe comitatus to his affiftance on mefne process. when a Writ of execution is awarded against the defendant, on account of the condemnation money not being paid, or his not rendering himself, or being surrendered by his bail, it is then presumed that he will not be forthcoming, and therefore that the Sheriff ought to take the posse comitatus. And confequently, it cannot be a good return, that he took the body which was afterward rescued; for he might have taken

^{*} Vide Sect. 22. + Cro. Jac. 419. 3 Bulft. 198. Moor \$52. 1 Rol. Abr. 807. · Vid Gib. Hilt C. P

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the power of the county with him. and how on the return of a refere, the plaintiff may either bring an action on the cafe against the rescuera for his damage sustained; or on motion of the court will proceed criminally against them, and fine them at their discretion, or entitled ever a sure of the court will proceed criminally against them,

they had cassles, formesses, and liberties, whereby From the above Statute of Westminster the second also the original of commitment for contempts feems to be derived? For fince it gave the Sheriff power to punish by imprisone ment those who relisted him in executing process; of contequence the Judges who awarded fuch process must have the same authority to vindicate it. Hence, if any one offers any contempt to the Court or its proceedings, either by word or deed, he is subject to commitment during pleasure; a qua, non deliberetur, fine speciali pracepto domino Regis that is, not without special command of the same Court of Judge who committed him; for the King in such case speaks by the mouth of his Judges. So that notwithstanding the statute of Magna Charta t, that no one shall be imprisoned nisi per legale judicium parium suorum, vel per legem terræ; it is one part of the law of the land to commit for contempts; and this law stands confirmed by the Statute Westmin. 2. Judges, in old times, confirmed this flature to extend (98.4)

return of a refine of one arrested on make proofs has been held to be good + Think H (THT) ATTACHED determina-

process, whether mefue or pudicial, and therefore would not

allow the Sheriff to return a rejege to a viv. latital or capios

ad respondentium. But tinge the case of they and Probyt, a

tion was founded, is, that anciently every man in his accuno hard of the Alteration in the Process of the Court of Kings

and the forthcomman and the Bench.

Bench will make any refitance, showered by a necessary as he cannot know

PORMERLY there must have been, as appears before, a bill or complaint of a trespos filed in this Court, on which issued the precept called the Bill of Middlesex or Oxford-shire, or whatever county the court happened to be in, directed to the Sheriff to apprehend the detendant; and that, upon the return of non est inventus, the plaintist might then sue out a latitat into another county; and upon the like return, to that also, an alias capias, and after that a pluries capias. Or if the defendant was still to be found in the county, into which either of the above writs was awarded, but was not arrested thereby before the return, that then

^{*} Vide Gilb. Hift. C. P.

wen stoned be the sevelews sit us successed stagist Birrisla Bir had given from beings sit sewes habenesses subjection, substitution the Court was forced to interfere, and fuffer the plaintiff

The great delay of justice, if the defendant was incanother county than that in which the court was histing decanoned by the length of time that intervened between the filing of the original bill and the return of the precept iffued thereon, and the opportunity fuch delay isfforded dofendants to withdraw of fecrete themselves, the court of Ring's Bench at length remedied, by conflying at a plaintiff's flying out the latitat in the first instance, swithout first filing his bill in court, and fuing out a precept thereon insuppoling that the bill or complaint had been properly filed, and that the precept had been delivered to and was dudy returned by the Sheriff. This practice evidently tending to the furtherance of justice, and not only faving thouble and time, but eventually a confiderable expence, is another of those fictions in law, which, being equally beneficial to both parties, serves to illustrate the maxim in fictione juris confissit æquitas,

The introduction of it however, necessarily occasioned a small alteration in the wording of the process. For if we observe, the latitat used formerly to recite the bill before fued out sound also, that the Sheriff to whom it was directed, on the return day, mentioning the very day on which it was returnable,] had returned, "that the defendant was "not found in his bailiwick." Now, as there was no bill actually fued out, there could be no vertain day mentioned on which it was returned to the court. So that the latter, inflead of retaining its old form, when it come to be used as the first process, was made to run thus, who Whereas we lately commanded our Sheriff of Middlefex, that he should take C. D. if he might be found in his bailiwicks and fafely keep him, fo that he might have his body before us, at Westingser, at a certain day now pass, to answer A B.

Lead of a plea, Cc. Upon which fail day, the said Sherist

returned, Cc. Thus making the words, and diertain

day now pass, supposed to have previously issued. But when judgment was had against the defendant, either doon beinglibrought into court by the latitat as the first process; or by the specept of bill without a bill of complaint actually filed before, if he had a mind to be litigious, he could bring a writ of error, and affign for errors the want of a bill filed before the awarding of process; for without it the controclearly had not jurisdiction. But here again, to support the ficd

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tion they had connived at and protect the judgment they had given from being lets ande for lo frivolus an objection, the Court was forced to interfere, and fuffer the plaintiff, in case a surith of error was brought, to file his bill of complaint stand, if necessary, get the precept returned, as if regularly done at the first provided he did the same before the errors were affigued pout afterwards it could not be done by This practice continues to this day the filing of a bill, in the first instance, between indifferent perfons, not being at all necessary to give the court jurisdiction, unless a writ of error is brought on the judgment; and then, for form fake, the plaintiff must do it before the errors are affigned. For, thould the defendant take advantage of the want thereof in his affigument of errors, the judgment must of course be reversed. But suits against Piers, and Members of Parliament, Officers of the Court, and Attornies, as they cannot be arrested] and actual prisoners, must be regularly commenced at the first, wal ni snothit sledt both parties, ferves to illustrate the maxim in filling mois

The introduction of it however, necessarily accessioned a small alteralish in a Tvant grant quant of we should be the best with the street of the best before

Of the Alteration in the Process of the Court of Com-

BOUT the same time the foregoing practice was introduced in the King's Bench, a similar one for the expedition of justice was connized at in the Common Pleas. For it became usual for a plaintiff in personal actions, instead to reserving to the Court of Choncery, to purchase his original writ adapted to the nature of his complaint, to go at once to the Common Pleas, and there sue out his capiar [which by this time was become the general process] and sarrest the desendant thereby before he could abscoud, or avoid the action against him. And afterwards, when the desendant was brought into Court, the original writ was proceured from the curstary, and a proper return made to it, and then filed with the custar brevium, to give the proceedings a colour of regularity,

So, if the defendant resided in another county than that in which the cause of action arose, or the plaintiff intended to try it, it became the practice to sue out the restaining capies furth, as in the King's Bench to sue out the capital, thereby

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mot delly legathing that the designed state of the model of the board and the board deligner of the court of the deligner of the deligner of the deligner of the deligner of the court of the deligner of the court of the deligner of the

.. " wwit, that then incontinently the fame should be uttered It ought here to be remarked by the Students thatlas' a plaintiff could not formerly have fued out's capicity but siste that county in which his gaufe of action acofe and into which the original write had affined and was required the mintent of the teffatum writ was to enable the plaintiff to follow him into any other county, and arred him therewith. The indulgence allowed plaintiffs of fuing out the telfatum o write at the shirth, was often the occasion of great in convemience, prejudice, and expense to defendants is if the plaintiff intended to try his action in Norfolk, and the defendanterefided at a great diftance, for inftance, in Devenfire, the plaintiff would fue out his teftatum wit into Dewonshire upon the supposition that the defendant had filed there, and then get his ariginal weit and capier thereon returned as in Norfall to warrant his proceedings. By this practice, the defendant was put to the necessity of carrying his witnesses if the baids was to be tried, from Devenshire into Norfolk, which certainly was a great hardship upon bim and attended with noninconfiderable expendent But the Courts, to remedy fuch inconvenience, his upon a miethad for the defendant to have the cause tried in the county where is actually arose, by giving him leave to move the Court to change the " venue, upon an affidavit made that the cause of action, if any, arose in Devenshire and not in Norfalls. On fuch a motion it will, to this day, be accordingly changed, and it cannot afterwards be brought back by the plaintiff, unless, he will undertake to give evidence of the matter in illue in that county in which he has laid it.

The practice of changing the venue in personal actions, for real and mixt actions must fill be laid in their proper counties, sthough in local actions the Court will change the venue upon application, if it appears that a lair and impartial trial cannot be had a role from the con-

way be charged, under fittle Fine, page 110. of this volume.

Bruchion put upon the fatytes bod Rithard the feeled a fator. based ob perarred liberatte tastai abit of ut astaide Air v afuaccompt, randralb other duch actions the brom thenestouth taken in their counties, and directed touthe Sheriffsof ad the courties where the contracts of the fame said life, off Ondernation Bhat of from thenceforth in pleas aupon attachesfame writ, it should be declared that the contracts was " made in another county than is contained in the original writ, that then incontinently the same should be utters "fel with a ted Min Asy by this hatute, other write was to be abated, if the plaintiff declared in a different county than o that mentioned in the writy at was dondrued to give the Court a power alfo, if the plaintiff wilfully laid his action in another county than where it arole, of compelling him to toy it in the county in which he ought to have laid it. And rather than abate the writin fuch cafe, which would only tend to the delay of justice and encrease of expence to the parties, the Courts thought, that changing the venue if the defendant requested it, was the likeliest method of preventing both. But, in cases of felongs the trial by the common law, hall be always in the fame place where the beffence was and hall not be supposed in any other place; for in all criminal cases, the rule holds to this day, aboquis a delinquit, sibn punietun. a Inconder however, that there should be little or and necessity for applications to change the venue s in work cases, attornes were prohibited under heavy pemalties, from knowingly laying actions out of their proper idouncies why feveral tules made in the befrective Courts, the Courts, to reluminade Chaminade of Courts and gainer shod for the defendant to have the cause tried in the county where it actually arofe, by giving him leave to move the Court to change the voune, upon an affidavit made that the cruse of action, if any, arose in Devembere and not in Mortel . CHEAPTER THE DEEVENTA. Metrol ingly changed, and it cannot afterwards be brought back by

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Of the old Rules of Court with respect to putting in bis and and Bail to the Action.

HEN the court of King Burch had obtained togthe original writ to be made returnable there, or elfe by conniving at the plaintiff's declating in debt, covenant, or the like civil action, when the defendant was arrested by the process of bill or latitat; a rule was made to regulate the putting special bail to the action. If the plaintiff projecuted for a debt, or damages, under twenty pounds, common boil was

was fufficient; but if his demand or damage exceeded that fum, field bail, according to the amount thereof, was rerole to the like effect was also made in the Common Pleas. as appears by the Compleat Attorney, fol. 45, printed in 1676, where it is faid, "That if the defendant be arrefted by mefne process, as capias, alias, or pluries, and the plaintiff holdeth him not sufficient to pay the debt or damages contained in the writ, the same amounting to twenty pounds or upwards; 'in this case the plaintiff, upon the recurrence of the writ, by entering a ne recipiatur with the filazer, out of whose office the capias issued, may crave frecial bail to be put in to his action before fome Judge of the court." And it appears, that where a me recipiatur was entered to the intent to have special bail to the action, it was irregular in the defendant's attorney to file his warrant of attorney, till such special bail was put in and allowed by the court. And when the capias had become the first process in civil actions, as no certain debt or demand was expressed in it, but only mention made of a trespass generally, if the plaintiff entered a ne recipiatur in order to have special bail, it was usual for the defendant to Tummon him before a Judge, to make him Rate his true cause of action, And that being done, the Judge used his discretion in allowing of common or special bail, as the nature . of the cafe or importance of the action feemed to require. From twenty pounds, as the value of money decreafed, it fell to ten pounds in both courts; fo that unless the plaintiff could fatisfy the court, or one of its Judges, that his cause of action amounted to ten pounds and upwards, common bail was sufficient. et that, for divers years now last past, very many of

se latitate, and other like write, inued out of the courts of the Kinty Town of the man the Kinty Tot expeding

se Majesty's good subjects have been arrested upon general

Of the Alteration occasioned in the Process of the Courts and not by the side of 13 Char. 2 State 2 of 1 de 1911 20

of fuch persons to arrested and imprisoned THE Caryler a 3d-of Henry 6. 41, 20, made in affirmance and the common law, and which gave defendants the liberty of tendering bail to the Sheriff when arrested for any range of action against them, did not give that relief which the Legislature evidently intended to afford. For it was still in the power of the plaintiff to lay his damages in the writ to a confiderable amount, when he had little or no cause of complaint. complaint. And as the Sheriff, for his own fecurity, upon releasing the defendant from prison, required the sureties in the bond to flipulate for payment of double the fum exprested in the writ, in case of default, defendants frequently fuffered imprisonment till the return-day, by reason of their inability to procure friends to engage for them under for large a penalty as the theriff required. The taking out process to arrest a person, and marking it to a large amount, became also an excellent engine for the employment of malice. And it was often feen that men were arrested for large debts, which they had never incurred, and by process in the names of persons with whom they never had any dealings, These flagrant abuses, so severely felt by individuals, and fo loudly complained of by the publick, called forth the flatute 1 3th of Charles the second, which is intitled, 44 An act for prevention of vexations and oppressions by " arrefts, and of delays in fuits in law;" and which, after reciting, "That by the ancient and fundamental laws of this realm, in case where any person is sued, im-" pleaded, or arrested, by any writ, bill, or process, islu-" ing out of any of his Majesty's courts of record at West. " minster in any common plea, at the fuit of any common se person, the true cause of action ought to be set forth 45 and particularly expressed in such writ, bill, or process, 55 whereby the defendant may have certain knowledge of the cause of the suit, and the officer who shall execute 15 fuch writ, bill, or process, may know how to take security for the appearance of the defendant to the fame, and the fureties for fuch appearance may rightly underfand for what cause they become engaged; and whereas " there is great complaint of the people of this realm, " that, for divers years now last past, very many of his Majefty's good subjects have been arrested upon general " writs of trefpass quare claufum fregit, bills of Middlefex, se latitats, and other like writs, issued out of the courts of the King's Bench and Common Pleas, not expressing " any particular or certain cause of action, and thereupon kept prisoners for a long time for want of bail, bonds with furcties for appearances having been demanded in fo great " fums, that few or none have dared to be fecurity for the appearances of fuch persons so arrested and imprisoned, although in fruth there hath beent little or no cause of action and oftentimes there are no fuch persons who are named plaintiffs, but those arrests have been many times procured by malicious persons, to vex and opprets the defendants, or to force from them unreasonable and will uff compositions (for obtaining their liberty; and by complaint

fuch evil practices many have been and are daily undone. and destroyed in their estates, without possibility of have ing reparation, the actors employed in such practices having been (for the most part) poor and larking persons, and their actings to fecret, that it hath been found yers difficult to make true discoveries or proof thereof: ORDAFAS, "That no person who shall happen to be arrested by any Sheriff, Under-theriff, Coroner, Steward, os Bailiff of any franchise or liberty, or by any other Ofwithin this realm, having, or pretending to have, authority of warrant in that behalf, by force or colour of any writ, bill, or process, isluing or to be issuing out of his Majesty's faid courts of the King's Bench and " Common Pleas, or either of them, in which faid write bill, or process, the certainty and true cause of action is not expressed particularly, and for which the defendant in fuch writ, bill, or process named, is bailable by the flatute in that behalf made in the three and twentieth " year of the reign of the late King Henry the fixth, shall be forced or compelled to give fecurity, or to enter into bond with fureties for the appearance of fuch person, fo arrelled, at the day and place in the faid writ, bill, or process, specified or contained, in any penalty or sum " or fums of money, not exceeding the fum of forty pounds of lawful money of England to be conditioned for se such appearance and that all Sheriffs, and other officers and ministers aforesaid, shall let to bail and deliver out of prilon, and from their and every of their custodies respectively, every person whatsoever by them or any of them arrested upon any such writ, bill, or process, wherein the certainty and true cause of action is not particularly expressed, upon security in the sum of forty pounds, and no more, given for appearance."

This beneficial statute, without any such intent in the makers of it, had like to have taken from the court of King's Bench, all its acquired jurisdiction over actions and civil injuries not committed with farce, profecuted by their process of bill or latitat, which presupposes a bill. For it we remember, the Bill of Middleses or other county where the court was, [the original process of the King's Bench] was calculated only for trespalles, and civil injuries contrapaten which savoured of a criminal nature; and not for debts breach of pontraid of the; like of which this court assumed to hold please by consequence only of the defendant's being in the custody of a their marshal. And as this statute required the real cause of

action to be expressed in the writ, by which the defendant ato !.) there would have been an end of their inveltigation of civil actions of any amount, if the court had not hit upon the following expedient to fave their assumed jurisdiction from being overthrown and destroyed.

To their bill or latitat commanding the theriff to arrest the defendant to answer the plaintiff in a plea of trespass, (provided the cause of action warranted the holding to bail in above 40 1.) they inferted an ac etiam clause specifying the true cause of action, in this manner, " And also, to a bill of the faid A. B. for one hundred pounds of debt (or as the ce case happened to be) according to the custom of the court of our lord the king, before the king himself to be exhibited, and that he have then there this, the case was. By this device the statute was complied with, as the true cause of action was expressed in the process. to warrant the defendant's infifting upon bail to above forty. pounds, and the court still retained its jurisdiction, as the cirwit matter was fuggeffed to be only a collateral charge, and not the cause of action for which the arrest was made-which was full the tresposs supposed to have been committed, of. which the court had legally cognisance.

In like manner the Common Pleas inferted a claule of ac. etiam, mentioning the true cause of action, in the writ of capies quare claufum fregit, if the plaintiff did not mean to proceed to outlaw the defendant. But the arrest was still authorised by the capies, which supposed that the desendant. had broken the plaintrif's close of et armis, and the ac etiam. clause shewed the true cause of action, and sufficiently pointed out to the theriff in obedience to the flatute, to what greater, penalty than forty pounds he might infilt upon the bail's being liable.

The practice of fuing out the capies as the hist process was not only the means of a plaintiff's often getting his debe the fooner, but also prevented that unnecessary delay and great expence which in old times attended the fuing out a Jucial original with other process thereon adapted to the plaintiff's particular cafe. So that the original writs which formerly iffued, and are now supposed to iffue out of Chancery at the fire, to give the court its jurisdiction, became nothing more than mere blank forms of the writ of quare clausum fregit, made Teturnable in the Common Pleas; which writs are now. precured at the end of the term from the curlitor, and often. atute required the real cause of

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after the very units are determined which they are supposed to have given the top nand filed in the office of the later and he of the filed of the supposed of the filed of the supposed of the filed of the out a capta to a state of the defendance of the defendance of the filed of the out a capta to the filed of the out a capta to the filed of the defendance of the filed of the out a capta to the filed of the out of

In confequence also of this statute of Charles the fecond, 2 rule of court was made in the Common Pleas for the purpose of faving expence to the fuitors, to avoid in the plaintiff's declaration, long and unnecessary repetitions of the briginal writ: by which it was ordered that the declarations in actions of trespals, case, &c. other than debt, should not repeat the original writ, but only the nature of the action. Iffeed therefore of fpreading the writ before the plaintiff counted upon it in his declaration, the nature of the action was mentioned in this manner : " Berksbire, C. D. late of Abingdon. in the faid county, yeoman, was attached to answer A. B. in a plea of trefpafs on the cafe, &c. And whereupon the faid A. by his attorney complains, that whereas fand for on with the declaration,") Thus, after having flated the nature of the action, supplying the recital of the supposed eriginal by the comprehensive word of "Gr." But in case of a real trefpass it must be remembered, as the writ is no other than a mere general claufum fregit, it continues to be the practice for the plaintiff to expole it in his declaration.

The word attached is used in the plaintiff's declaration, when the action founds only in damages, because actions for damages were formerly and are still supposed to be commenced by the original wirt of pone, or fi te fecerit fecurum, which we have feer at once commanded the fheriff, when the plaintiff had found him pledges for profecution, to put by or attach the defendant by his gages and pledges, in order to enforce his the like actions, although the capias was allowed by flatute a process in them, to bring the defendant into court, it fill continues to be faid that the defendant was summoned. as if the Precipe quod reddat had been actually fued out in the first instance, and the defendant thereupon properly fummoned. For when the capies came to be used in personal actions as the first process, they made out the original writ returnable the same term in which the defendant appeared or if the fuit was by special original they made the defendant file his warrant of attorney, in the fame term in which he really appeared. Hence, no notice whatever was taken of the mejne process upon the roll, as formerly; "but, the decla-

ration began with flating that the defendant was fummoned as he was supposed to have been. And though a return of non eft inventus appeared on the original, which was necessary to entitle the plaintiff to fue out a capias to arrest the defendant, yet, as the defendant filed his appearance as of the term in which the original was returnable, it warranted the recital that he was funmoned. Nor is the return of non eff inventus to the write contrary to the declaration, for though the defendant might not be found in that county where the writ was directed, yet he might have had notice and appeared according to the fummans? Stirled sale vine

the will being the plaintiff collar foreading It will be proper here to take some notice of the finer formerly payable by the fuitors in the superior courts, and of those fines which continue to this day to be exacted from them by the crown, Fines were originally of several forts t. Some in nature of an exaction by the King, upon giving leave to a subject to prosecute a suit in his superior courts; others in nature of a penalty fet on offenders after conviction, and on plaintiffs failing in their fuits-on parties making falle claims or for fraud and deceit to the court for vexation under colour of law-for contempt against the king's writs or statutes. Others again in nature of an imposition set by the court on the fuitors, with a view to enforce plainness and perspicuity in pleadings. These latter were imposed even in the inferior courts, till the statute of I Marlbridge, provided "that neither in the circuit of justices, nor in counties, "hundreds, and courts-baron, any fines shall be taken of " any man pro pulchre placitanda, or beaupleading." Which flatute was further enforced, and made to extend to the fuperior courts alfo, by the flatute Westminfter the First S. But. the former have been suffered to continue. And they were formerly of money, or other things, as money was exceedingly scarce. Sir Matthew Hale gives an instance of a fine paid at the commencement of a fuit between the men of Yarmouth and Hastings, in the reign of King John, in theig words, " offerunt domina tres palfredos, et fex afterias narenfes " ad inquisitionem habendam per legales, &c." which fine appears to have been of three state horses, or pacing nags for the King, and fix long-bill'd herons or egrets. So exorbitant were the fines upon original writs, exacted from the subject in the reign of this King, whose misfortune it was not to know in what manner to use his prerogative, that they made one amongst the many complaints of the times, and frem to have

[†] Vide 8 Co. Beecher's Cafe . 1 52 Hen. 3. 6. 11. § 3 Edw. 1. c. 8. noitea

occasioned the 44th article in the great Charter; wherein he exprestly stipulated in these words, " well wendernes with negabimus, nulli differentes justiciam vel rectum." But not with flanding this concession, fines did not cease to be required from the subject, upon obtaining leave to fue in the King courts. For the Sovereign's right to exact fines in fuch cufes was not at all in dispute, the barons only meaning to guard by the charter, that they should hereafter be imposed with moderation; having regard to the importance of the action and ability of the fuitor. In confequence therefore of this provision in Magna Charta, the payment of fines was put on a regular footing, and as they were reduced to a certainty inflead of being ad libitum of the Sovereign or his Chancellor, and not fo excessive as before, they were agreed to without any great helitation. has to be at empanghed paid enbeled

for a hear a recovery, in the equitor of debr. There, was allow With regard to the time of paying the fine, and of whom it should be exacted in civil actions, there was a distinction." For if a plaintiff fued for a debt, and took out the practive guod reddat, he paid the * fine immediately to the Curffier in proportion to his demand. And here the fine could be taken at first, the plaintiff having afcertained his demand, for which the Cursiton could easily apportion the sum due for the fine. But if he took out a pone, or fi te fecerit fecurum, with a view only to recover a fatisfaction in general, the fine could not be taken at the first; because the intervention of a jury was necessary to ascertain the plaintiff's demand. And as this was the proper writ adapted for trefpaffes, and consequential injuries arising from the neglect or deceit of the defendant, be was to pay it, and the amount of it was to be regulated by the damages given in the judgment; and an award of the writ of capitatur pro fine in fuch cases was entered up after the judgment, in this manner, " of pris-" didus defendens capiatur." A fimilar entry was alfo made. and a like writ iffued, in all cases after a judgment in the King's Bench in a fuit there by bill, which was the process of that court for trespasses, and such like injuries committed contra pacem, for which a fine was always payable.

In a pracipe for a debt, if it amounted to 60 marks, here. i. e. 401.—he paid a noble If to 100 marks - a noble and a half - - in the bristo to o If to 150 marks—a mark If to 200 marks—a mark and a half And for every 100 marks more—a noble 68 who or giods immeges ad bos and flangs busines

INTRODUCTION.

From the nature of these fines, and manner of taking them, arole the joinder in action, as it is termed in our law books For all matters of debt, which the plaintiff had against the defendant, could be put in one and the fame writ, because the fine could be taken at once by the Curfitor upon making out the writ. But the plaintiff could not fue for a debt, or specific demand, and a trespuls or other confequential injury, by one and the fame writ; because the fine for the debt was payable at first by himself, and for the trefpefs, after the fuit was determined, by the defendant the amount whereof could not be known till it was imposed: by the court, and the court could not impose it till a jury had afcertained what damage the plaintiff had fultained. Befides the judgments in debt and in trespass were different for after a recovery in an action of debt, there was also a judgment gued fit in misericordia, for the + amerciament, which was to be affected in the county; whereas in trespass; after the recovery of damages, there was a judgment quod capiatur for the fine to the crown. Nor could trefpafs and trespals an the case be joined in one and the same writ; because, as the first sayoured of a criminal nature, there was a qued capiatur, and as the last was only a civil injury, a qued fit in misericordia was entered.

When it became the practice for plaintiffs in personal actions immediately to sue out the writ of capins quare clausum fregit, in order to arrest the defendant, and thereby the sooner, affect an appearance, which was the practice long before this statute of Charles the second, they avoided in great measure the paying the sine to the Crown. For upon a capius no sine was exacted; because the writ was supposed to issue for a trespass, though the court winked at a plaintiff's declaring in debt, covenant, or the like action, when the defendant was brought into court. And when that statute was made requiring the true cause of action to be expressed in the writ to hold the desendant to bail in above forty pounds upon

As to fines and amerciaments, and when and by whom amerciaments shall be affected, vide Griefley's case, 8 Co.—and Beecher's case, ibid.

cinera pacem, for which a for war always payable.

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If the defendant was a Duke, Marquis, Earl, Viscount, or Baron, the amercement was to 100 millings, which was the greatest amercement; but if he was a gentleman or common person, it seems that it was affected in proportion to the nature of the demand against him, and his apparent ability to pay it. Vide 6 Co. 45, and authorities there cited in the margin.

the arrest, the plaintiff had still an opportunity of avoiding the fine upon suing for a debt, (unless he intended to proceed to outlaw the defendant), because he could shew his true cause of action by inserting an ac etiam clause in a capias. And though in fact a debt, or other matter of contract, was his only cause of action, yet it was considered but as a collateral charge, for the defendant was in siction of law arrested for a trespass; and the ac etiam clause was for nothing more than to shew the true cause of action, and point out to the Sherist to what amount he might insist upon bail. The fine therefore was only paid by the plaintist when he actually sued out a pracipe quod reddat for a debt, or a pracipe for a sum certain upon covenant broken, or pone for a sum certain on promise, which was never done, nor is it often done at this day, unless it is apprehended the defendant will be litigious, or is difficult of access, and has property which the plaintist can reach by proceeding with a view to eutlaw him.

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In case however a writ of error should be brought upon a judgment by default in an action of debt profecuted by a common capias quare clausum fregit, or a capias with an ac etiam in it, the plaintiff, if he would protect his judgment, and prevent the want of an original writ from being affigned for error, must sue out a real original writ in debt, adapted to the action he profecuted; on which the Cursitor will then apportion and take the fine from him, otherwise the judgment must be reversed; because it would appear to be in debt, when the process was for a trespass. But in case no writ of error should be brought on fuch judgment by default, then the plaintiff need not purchase any such original writ, and consequently the fine will be avoided. Nor need he fue out fuch an original afterwards, if his judgment in debt is had on a verdiet, though he prosecuted the action by a capias only. For in that case, should a writ of error be brought, the plaintiff can call to his aid one of those convenient statutes of Jeofails, viz. the 18th of Elizabeth, c. 14. which will (if the want of form be the only objection) protect his judgment obtained on a verdict against the artiflery of Westminster-hall, and not suffer the Judges, though they had never such inclination, to relieve the defendant on this ground of error. But should an ill original writ, on a writ of error brought, and certiorari awarded to the court below, be certified by that court to the court where the appeal is made, the judgment will be reverled; but not if they should certify there was no original at all. Because the want of an original writ, after a verdict has been obtained in the caufe,

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is cured by the statutes of feofails; but an ill original is not within any of their liberal and falutary provisions.

The actual amerciament of the defendant after a judgment against him in debt, covenant, case, and the like actions, has long fince been discontinued, though the form of awarding the writ continues in the entry of the judgment to this day. And the capiatur fine in actions of trefpos, ejectment, and other actions favouring of a criminal nature, as it was oppressive to poor defendants who might have been outlawed for not paying it, or, if ever recovered, being feldom accounted for in the Exchequer, was taken away by the flatute 5 W. & M. c. 12, and instead thereof the plaintiff is directed to pay the fum of 6 s. 8 d. to the Master or Prothonotary at the time of figning the judgment, which is after-wards allowed the plaintiff again when he comes before them to have the costs of his fuit taxed against the defendant. So that the writ of capias pro fine has fallen into disuse. iouard on bland

erlam in it, the plaintiff, if he a ould protect, his judgment, belges Chapter the Thirteenth. n arer, adapted

a judgment by default in an adion of debt profecuted by a

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I Have hitherto declined making mention of outlawry but where it was unavoidable, that I might not confound the Student in stating the alterations and differences in the process of the courts; and having only spoken of the nature and operation of the process to effect an appearance of the defendant in court, and of his appearance in confequence thereof, we come now to speak of the judgment of outlawry, which is a judgment pronounced upon him for not appearing in court to a fuit there instituted against him.

un be the only object In early times no man could be outlawed for any civil matter whatever, treason and felony being the only offences [as they were punishable with death] for which the delinquent could be proceeded against to autlawry. And as he, who was thus proceeded against, was put entirely out of the protection of the law, forfeited all his goods and chattels, loft the profits of his lands, might be imprisoned, and even put to death with impunity, the consequences were grievous and terrible. But notwithstanding, they did not deter men from the commission of crimes that warranted such a judgment

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judgment against them; for history informs us of those who not only suffered the denunciation of outlawry to be pronounced against them, but who afterwards fet government at defiance, and braved the consequences of it, by associating together and committing continual depredations on the lands and property of the neighbouring people.

On the separation of the courts in consequence of magne charta, in order that the publick peace might be the better preserved, process of autlawry was ordained to lie in those civil actions committed vi et armis, which warranted the capies ad respondendum upon a disobedience to the original writ. And soon after, when the country became more polished and civilized, the power which any one had of putting an outlaw to death, and which had occasioned some extravagant cruelties, was taken away by an ordennance in the reign of Edward the third, whereby no one in future but the Sheriff was to put an * outlaw to death, even for selony; but the other consequences continued as before.

As the capias was a proceeding towards cutlawry, which all but the most contumacious delinquents would wish to avoid, and gave authority to the Sheriff to arrest the defendant, we have seen, in a former chapter, how the Legislature at different periods, extended it to other actions than those committed with sorce. And as the capias was no more than the offspring of an original writ, and awarded only upon an actual or supposed disobedience thereto, it follows that no one can be outlawed for any civil matter, unless the suit be commenced by original, and in those civil actions only where the capias is given as a process upon the original. So that in proceedings by bill, no one can be prosecuted to authority.

The confequences of outlowry being exceedingly penal, the law took especial care that such judgment should not

But one attainted in a premunine might have been put to death by any one, as the King's enemy, till to late as the reign of Queen Elizabeth, when, to obviate to lavage and mittaken a notion, that it was lawful at all times to kill an enemy, or one attainted in a premunire, who was confidered as an enemy, the flat. 5th of Eliz. c. I. provides, That it shall not be lawful to kill any person attainted in a premunire, any law, (vide 25th of Edw. 3. flat. 5. c. 22.) opinion, or exposition of law to the contrary not-withstanding.

be pronounced without a fufficient warning before-hand for the party to reflect upon the disagreeable situation be would be reduced to, if, from his obffinacy, he fuffered it to take place, and not be amenable to justice by coming into court, and answering the matter wherewith he was charged. Three capies's therefore were required to illue before the writ of exigent to pronounce him outlawed could be obtained; that is, the capias, alias, and pluries, each of which were to have fifteen days between the teste and return. And that fuch a proceeding might not be imaggled through the King's courts, without the regular forms were observed, it was provided that many different officers should be concerned in it. First, the Chanceller, from whose office issued the original writ; then the Filazer of the court, into which the original writ was returned, who made out the capias, alias, and pluries, in order to acrest the defendant; then, if these writs were returned with a non eff inventus, the Exigenter, who made out the writ of exigent, and the Sheriff to whom this, as well as the former writs were to be directed. and who was required in it to exact or call for the defendant to furrender himself in five different courts; and, laftly, the Coroner, who, on the defendant's repeated defaults, was publickly to pronounce the judgment of outlawry all but the most against him. avoid, and gave authority to the

It must be observed, that I am here speaking of outlawry upon mefne process in civil actions, and not of outlawr after judgment thereon, for want of the defendant's fatisfying the judgment, or rendering himfelf in execution, fthe procels to which is not fo dilatory), nor of outlawry in criminal cases. For in criminal cases outlawry incurs not only a forfeiture of goods and chattels, but also of the real estate of the offender, and at common law works a corruption of blood; whereas in civil matters the King derives no estate from outlawry, but only a pernancy of the profits. And process of outlawry after judgment in a fuit commenced by original, where the capias ad respondendum is used as the meine process, may be effected immediately after the return of the capias ad fatisfaciendum, without fuing out an alias and pluries. Because in such case the party having been already in court, and having conusance of the debt or damages recovered, he ought to pay the same on the first Tuing out the capias ad fatisfaciendum; otherwise it is a contumacy win not performing the judgment of the court, for

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which disobedience he may be put in exigent directly. And as in civil actions process of outlawry was only given the sooner to compel the defendant's appearance, it may with more ease be superfeded or reversed, and the King's pernancy of the profits discharged, than in a criminal case. But if outlawry is pronounced after judgment obtained in a civil action, it can neither be superfeded nor reversed till compleat satisfaction is made, and entered up on the roll.

When the writ of exigent went forth, it was required to go into that county where the defendant really was, for there the action formerly was laid] notwithstanding the previous writs, as we have feen by connivance of the court, might be otherwise directed. And the exacting of the defendant was to be at the tourn or criminal court, and not at the county court, (which was the Sheriffs court for civil matters), for the Coroner was to pronounce the judgment of outlawry, after the quinto exactus, or being five different times exacted or called for. And in the tourn the Coroners originally, who were the ancient confervators of the peace, and men of the first reputation in the county, presided with the Sheriff; whereas in the civil or county court, the Coroner had nothing to do. But as Sheriffs, regardless of their duty, in time neglected feeking after the defendant upon the capias, and often returned that and the alias and pluries writs with a non eft inventus of courfe, whereupon the exigent issued, and men were outlawed without knowing that any process had issued against them, the statute 4th of Hen. 8. c. 4. amended by the 6th of Hen. 8. c. 4. enacts, That the Sheriff shall also make three proclamations within his county, at three feveral days, two of them to be made in the full and plain thire court of the same county, and the third at the general fessions in those parts where the party is supposed to be dwelling, &o!" And for the better avoiding of private and fecret outlawries, the 31st of Eliza c. 3. provides, "That in every personal "action, wherein any writ of exigent shall be awarded out " of any court, one " writ of proclamation shall be awarded and made out of the fame, having day of teste and return, as the faid writ of exigent shall have, directed and + dehing, the realon of leading the transcript of the record

* It is supposed the writ of protlamation came in upon making the statute of Henry the 8th.

into the Exchequer, is, that thay may ta

The statute 4 & 5 W. & M. c. 22. directs proclamations on outlawries in criminal cases to be made according to this statute, except that the writ of proclamation shall be delivered to the Sheriff three months before the return,

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" livered of record to the Sheriff of the county where the "defendants at the time of the exigent for awarded hall is be dwelling so fuch writted proclamation thall contain the effects of the same action, and that the Sheriff of the "county, unto whom any fuch writ of proglamation shall be directed, shall make three proclamations in this form. " one in open county court, one other at the general quarter-fessions of the peace where the party defendant at the time of the exigent awarded shall be dwelling, and one other to be made one month at the least before the quinto " exactus, at or near the most usual door of the church or chapel of that town or parish where the defendant shall " be dwelling at the time of the exigent awarded, and if " he shall be dwelling out of a parish, then in such place of the parish in the same county next adjoining, and " upon a Sunday after divine service; and such writ to be "duly returned, or the outlawry to be void." And the fame statute also provides, for avoiding secret summonles in real actions, that after every fummons a proclamation thall be made at least fourteen days before the recurn thereof,

and men of the first reputation in the When autlawry is duly pronounced, and the writs of exis gent and proclamation are returned by the Sheriff, and recorded above, the plaintiff is at liberty to take out further process against him. And this process is either general or special. The first is a writ of capies utlagatum, by which only the body can be arrested and imprisoned. The latter is a special capies utlegatum, by which his body may not only be imprisoned, but his goods and chattels, lands and shofes in action, seized and extended. If his body is taken by fuch writ, he may now be admitted to bail, though formerly he could not, an outlaw being excepted out of the flatute 23 of Hen. 6. c. 9. And if his effects and lands are feized, the Sheriff must take an inquisition thereof, and return the same into the Court from whence issued the process. On which return, a transcript of the outlawry and inquisition is made out and transmitted into the Court of Exchequer. And should any debt to the outlaw be found and returned, a feire facias, on application to that Court, is awarded for the debtor to thew cause why it should not be paid to the The reason of sending the transcript of the record into the Exchequer, is, that they may take charge of the effects for the King, the outlaw being disabled from enjoying any thing he was possessed of, or otherwise entitled to; and the inquest having found him possessed of effects, the Exchequer, as the King's Court of ordinary revenue, must take care of them for him. But the Barons, for a gnolthere mouth before the return long time past, have usually granted a custodiam, briwrit to take in charge the goods of one outlawed by meshe process, to the original plaintiff who thus proceeded against him.

does so before the exigent is returned into Court on Should the defendant still continue at large, and not come finto Court to reverse or superfede the gutlawry, the plaintiff may obtain a fatisfaction for his demand out of the effects found by the inquest. In order to this, the plaintiff, when the transcript is fent into the Exchaquer. must apply to the Remembrancer's office for a writ of wenditioni expenses, which empowers the Sheriff to fell the goods he has feized; and if the money made thereof done not amount to more than 20 1. the Court of Exchequer, son motion, will order it to be paid to the plaintiff. But if hit exceeds that fum, the plaintiff must present a petition to the Lords of the Treasury, that the money levied may go towards fatisfaction of his demand. On presenting this petition, it is referred to the Solicitor of the Treasury, who must be attended with the writ of venditioni exponas and return, that he may fee what has been levied; and then an affidavit must be made before him of the plaintiff's demand, and of the costs and charges of the outlawry. If all which exceed the fum levied, he makes a report thereof to the Treafury-board; and thereupon a warrant is granted to the Attorney general, to obtain his confent for the plaintiff to move the Court of Exchequer, that the monies levied may be paid over to him; which, on the Attorney general's confent, will be ordered accordingly. But should the money levied exceed the plaintiff's colts and demand, which is feldom the case, the Attorney general's confent will be, that for much only as will fatisfy the fame may be paid him. As the whole of this proceeding is both tedious and expenfive, it never answers to the plaintiff, unless the sum levied mounts to fomething confiderable, as leaden to the student

be This is a method for the plaintiff to pursue in case an outlawed defendant has property, and cannot be arrested on the leapies utlagatum; or does not come into Court, and supersede or reverse the outlawry against him. Let us now see in what manner the outlaw may supersede the proceedings, or procure the judgment of outlawry pronounced against him to be reversed.

The taking out process of outlawry in civil matters being for no other purpose than to compel the desendant's appearance, and being regarded in these days but as a peculiar method of commencing a fuit, the desendant may avoid

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the penal confequences of it, by superseding or reversing it. If he would fuperfede it, the must take out a writ of superfeders directed to the fame Sheriff as the oxigent was provided he does so before the exigent is returned into Court. And buthis cufe, let the debt be never for large, he has no otention do putin bail. His appearance is then recorded of the term in which the exigent iffued. And this is allowed, because there is a day given him by that writ to come in; and therefore, the Courts give him leave to enter an appearance at any time before the outlawry is pronounced and returned. But though in fuch case he is not obliged to put in special bail, because he was never arrested or in custody, yet he must pay the plaintiff his full costs, and put him in the same condition as to his fuit, as if he had appeared before the exigi facias was awarded. This appearance may now be by attorney; though formerly, it was required to be in person. But if he does not come in till the outlowry has been pronounced and returned, he is driven to a writ of error to reverse it; that is, not to the necessity of fuing out an actual writ of error, and affiguing the errors on record; for, at this day, the Courts in civil cases will reverse an outlawry, upon any error being pointed to them on the record. Any error, whether in fatt or in law, as want of his proper addition, or the name of the ville or hamlet where he was conversant, or any irregularity in the proceedings, may be pointed out; for, in thort, any variance, omission, or triffing matter whatever, will be fusticient to reverse it, as the plaintiff is secured from receiving any injury from the reverfal. For by the ftat. 21 of Eliz. a. 3. it is enacted, "That before any allowance of any writ of error, or reverfing of any outlawry hen had "by plea or otherwise, through or by want of any proclamation to be had or made according to the form of the " flatute, the defendant in the original action shall put in " bail, not only to appear and answer to the plaintiff in the At former fuit in a new action to be commenced by the faid plaintiff for the cause mentioned in the first action, but " also to fatisfy the condemnation, if the plaintiff shall begin his fuit before the end of two terms next after the allowing of the writ of error, or otherwise avoiding of the fald outlawry." Though this flatute only mentions error for want of proclamation, yet mostly the recognizances of bail, for the reverfal of outlawry for other causes, has -been taken fince, ain conformity to it ig tuo gains and T ing for no other purpole than to compel the defendant's

If the defendant is taken, or comes in upon the capias at-

he must put in bail to the debt; because, being in coffol dy, he shall not be discharged without caution. But if no debt is mentioned in the original, his caution cannot be adjudged, there being no quantum of the plaintiff's be mand on the record and fo common bail is fufficient. The Court of King's Bench, however, have lately held, that if the cause of action originally required special bail, and the defendant will frand out to be outlawed, he shall gain no advantage by it; but shall put in special bail before the reversal, if the plaintiff infifts upon it *. But always, on the reversal of outlawry, the defendant must pay the plaintiff his full coffs, and put him in the fame condition as if he had appeared before the exigent was awarded. The party indeed usually satisfies the plaintiff his debt as well as his cofts, upon reverling the outlawry; as litigating the action is only attended with more cofts and expences. When the plaintiff, therefore, is satisfied, or the defendant's bail have entered into their recognizance, an order is made by the Court, or a Judge at his chambers before whom the parties appear, for the Clerk to reverse the outlawry; which reversal is entered upon the roll; and then the defendant is restored to his former state and condition, and may have restitution of his goods, if any have been taken in charge by the Sheriff or Court +.

The Common Pleas had for some time dispensed with the party's actual appearance in person to reverse an outlawry against him. But the King's Bench, till the statute 4 & 5 W. & M. 2. 18. in all cases, required an appearance in person. By which statute, for the more easy and speedy reversing of outlawries in that Court, it is enacted, "That no person whats soever, who shall be outlawed in the same Court, for any cause, matter, or thing whatsoever, (treason and second some in person into, or appear in person in the same Court to reverse such outlawry; but may appear by Attorney and reverse the same without bail, in all cases, except where special bail shall be ordered by the said Court."

Though treason and felony are only excepted by name out of this statute, yet the Court of King's Bench ‡ in the case

^{*} Burr. Rep. 4 pt. 1920. Campbell v. Daley.

^{† 5} Co. 90. b. ‡ East. 8 Geo. 3. Bur. Rep. 4 pt. 2527.

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of the King and Wilker held, that this flatute extends only to civil cases, and that the exception works to every triminal charge in For as the next clause empowers Sheriffs to diffe charge persons taken upon a capias utlagatum, upon an Attornev's engagement to appear for them, in cases where special bail is not required by the Court, and in those cases where special bail is required, then to discharge on bail being taken in double the fum for which bail is required, the Court faid, If a defendant is outlawed & after conviction in a criminal charge, or for a misdemeanour, how can the Sheriff know what the fine imposed by the court will be? And therefore, that the act must relate to civil cases only, and mean double the debt. On this flatute it has also been adjudged to that after reverfal of outlawry, the court has a discretionary power to require special bail or not, and that the want of an + affidavit before issuing the process is no objection, because that is only necessary to warrant an arrest; and if an assidavit is made in due time for the new action, that must be brought. fif the defendant, upon the reversal, will not fatisfy the plaintiff's demand] they may hold to special bail. And though the 31 of Eliz. c. 3. is the only act that exprelly requires bail, it is not to be inferred from thence, that in other cases it ought not to be infifted on. For that statute makes a new error, that is, the want of proclamation, and the bail upon it is absolutely to pay the condemnation money.

Hence as it appears that process to outlawry is considered. at this day, no more than as a process to compel an appearance, that outlawry may easily be superfeded or reversed, that bail must be put in by the defendant wherever it is requifite, by which the plaintiff has a fecurity for his demand, while he is establishing the same in due course of law and that an outlaw, like all others arrested on mesne process, may be discharged upon finding bail for his appearance; let us now fee in what manner a plaintiff must proceed if he would go on to outlawry. In order to this the plaintiff must first make out a pracipe for an original writ, stating his cause of action, which must be an action whereon the capias can issue as process, and carry the same to the curfitor, who will make out the original writ according to it.

Im Wilkes appeared personally in court, being outlawed, after conviction for a libel, and another misdemeanour, though no process had iffued on the outlawry, and claimed to be admitted to bail.

† Serocold v.— Hampson, Bart. Stra. 1179.

[†] Vide Statute 12 Geo. 1. c. 29. post.

But if it be in the King's Bench, the Filazer, after he has made out the process usually procures the original from the Curfitor to warrant its The original writ mult not bear defle before the cause of action accrued, though, to gain time, it may be tested and made returnable as of a precedent term, if the cause of action will warrant it. When this is procured, the Filazer, for expedition, if the plaintiff requires it, and there is a sufficient time, will make out the capias, alias, and pluries all at once, taking care that there are fifteen days between the teste and return of each. The succeeding writ' should regularly bear teste the return day of the preceding. After these writs are sealed, the plaintiff's attorney may return them of course indorsed with a non est inventus, if he cannot or does not chuse to arrest the defendant, and take out the exigent and proclamation from the Exigenter; who will make them out immediately, provided the pluries writ is flamped by the clerk of the warrants, or his deputy, but not before to For till the pluries writ is fo ftamped or figned oit -does not appear that the warrant of attorney is properly filed.

venience and expence, the statute 4 and 5 W. and M. E. 4. These writs of exigi facios and preclamation must be made out by the Exigenter of that county into which the pluries was sued, and when they are fealed, the exigent mult be directed and carried to the theriff of that county in which the action is laid, and the writ of proclamation to the theriff of that county wherein the defendant dwells at the time of awarding the exigent of These writs must be both tefted and made moturnable at the fame time, and there must be such time between the day of tefte and return, that five county days may sintervened in order that the defendant may be exacted or called for: but in dafe there is not time for the days, a writ of allocatur may be obtained, to bring in the five county days. In every county, except London, a county day is beld but once a month win London a county-court is held every fortnight on the huftings at Guildball For which reason, defendants are more usually outlained there than in any other place in the kingdome And it fignifies nothing where the raction originally is laid, for if the defendant after the reverfal will contest the fuit, the plaintiff may fue out his new original into the proper county and If the defendant fuffers the outlawry to be pronounced, and the writs of exigent and proclamation are returned by the theriffs, the writ of proclamation must be filed in the office of the custes breviums and the writ of exigent with the clerk of the outlawnies, of whom the plaintiff,

se or bail or bail-pieces, to taken as aforefaid, shall be tranfinted to some or one of the justices or baroas of the sese spective courts who presents fith or suit shall be dependits ing, who upon assidavit made of the due taking thereof,

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After these write are feeled, the plantiss attorney may read in a same of the putting in Special Bail before Commission of the cannot or does not chuse evines.

out the exigent and preclamation from the Exigenter; who HEN a defendant was arrested in the country by process from the superior courts he was somethy compelled at the return of the writ to put in his bail to the action in town. But as this was attended with great inconvenience and expence, the statute 4 and 5 W. and M. c. 4. provides, " That the chief justice and other justices of the King's Bench for the time being, or any two or more of " them whereof the faid chief justice to be one, and the chief inflice of the Common Pleas, and other the justices there for the time being, or any two of them, whereof the faid chief justice to be one, and also the chief baron and barons of the quoif of the court of Exchequer for the time being, or any two of them whereof the faid chief baron to be one, shall or may by one or more commission or commissions, under the several seals of the said respective courts, from time to time, as need shall require, impower fuch and fo many perfons, other than common attornies and folicitors, as they halk think fit and necessarvingall and every the usual shires and counties within the kingdom of England, dominions of Wales, and town of Berzwick upon Tweed, to take and receive all and every fuch recognizance or recognizances of bail or bails as any person or perfons shall be willing or deficous to acknowledge; or make before any of the perfons for impowered, in any * action or furt depending, or hereafter to be depending, in the faid respective courts, or any of them, in such manner and form, and by fuch recognizance or bail-piece, as the inflices and barons of the faid respective courts have used to take the fame, which faid recognizance of recognizances, " or bail or bail-pieces, so taken as aforesaid, shall be transmitted to some or one of the justices or barons of the re-" spective courts where such action or suit shall be depending, who upon affidavit made of the due taking thereof,

by fome credible person present at the taking thereof, such " justice or baron shall receive the same, upon payment of fuch fees as have been usually received for the taking of " special bails, by the justices and barons, clerks, and other the officers of faid respective courts; which recognizance of bail or bail-piece, so taken and transmitted, shall be of the like effect as if the fame were taken de bene effe before any of the faid justices and barons, &c. and then it impowers such commissioners to receive no more than two 66 shillings." And by fect. 2. a power is given to " the so justices and barons of making rules and orders for justiof fying of fuch bail and making the fame absolute as they think proper, fo as not to compel fuch cognizors of bail to appear in person in court, &c. unless such cognizor Westminster, or ten miles thereof; and the third clause impowers justices of affize in their circuit, to take fuch bail in a fimilar manner; and the of fourth and last fect. makes it felony for one to be bail in cale the detendant did not necessar in confidence in the writ, after he had been sampled to beile a western

These bail to the action taken before Commissioners in the country, pursuant to this statute, are taken de bene esse, or conditionally; that is, they are not to become absolute till a certain period has elapsed after the bail-piece is transmitted to a Judge of the court; which time is allowed for the plaintist to except to them for their insufficiency. And, if he does, they must justify either before the Commissioners in the country, or else in court; or before a Judge, by swearing themselves housekeepers, and each of them to be worth double the sum for which they are bail, after the payment of all their just debts. But if the plaintist proceeds before the time is elapsed, and delivers his declaration without excepting to them, it is an implied admission of their sufficiency; unless he delivers the same de bene esse, or conditionally, till good bail is compleated.

brought, may by side, or moss of the fame court, give "the relative safe or the family upon the family bond or other fewers, caken from "the basis upon the family bond or other fewers, caken from "the basis upon the family upon the family

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Of assigning the Bail-bond to the Plaintiff.

HE indulgence given to defendants, by the statute 23 of Hen. 6. c. 9. by permitting them to give bail to the Sheriff for their appearance to the action when arrested by process, was not only sollowed with great losses

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and inconvenience to Sheriffs, but also frequently occasioned a prejudice to plaintiffs who had just demands and causes of action. For if the Sheriff had taken bail for the appearance of the defendant, and he did not appear, the plaintiff proceeded against the Sheriff, by ruling him first to return the wrat, and then upon the return of cepi carpus, and not producing the body, by process of attachment; unless the Sheriff gave him up the bail-bond he had taken, and futfered him to profecute the bail: but this was entirely optional in the Sheriff. If on the other hand, upon the defendant's not appearing in court, the Sheriff made no return to the writ, he was amerced. And if he returned the write fallely, he made himfelf liable to an action from the plaintiff, in which the plaintiff often failed, from the difficulty he laid under of proving that the Sheriff actually arrested the defendant, or had him in view, and might have executed the process upon him. But to remedy these and other inconveniences arising both to the Sheriff and plaintiff, in case the desendant did not appear in court at the return of the writ, after he had been admitted to bail; it was provided by the 4 & 5 of Ann. c. 16. f. 20. " That if any ce person shall be arrested by any writ, bill, or process, out of any of the courts of record at Westminster, at the fuit of any common person; and the Sheriff, or other " officer, takes bail from fuch person, against whom such or process is taken out; the Sheriff, or other officer, at the request and costs of the plaintiff, in such action or suit, or his lawful attorney, shall assign to the plaintiff in " fuch action, the bail-bond, or other fecurity taken from " fuch bail, by indorling the same, and attesting it under " his hand and feal, in the presence of two or more credie " ble witnesses; which may be done without any stamp, provided the affignment fo indorfed be duly frampt before any action be brought thereupon. And if the faid bail-bond or affignment, or other fecurity taken for bail, " be forfeited, the plaintiff in such action, after such af-" fignment made, may bring an action and fuit thereupon, in his own name; and the court where the action is " brought, may, by rule, or rules of the same court, give " fuch relief to the plaintiff in the original action, and to " the bail, upon the faid bond or other fecurity taken from " fuch bail, as is agreeable to justice and reason; and that " fuch rule or rules of the faid court shall have the nature " and effect of a defeafance to fuch bail-bond, or other teto the Sheriff for their appearance to the action when ar-

Red by process, was not only followed with great lother

By this statute the plaintiff is made secure. For if the bail taken upon the arrest are responsible men, the Sheriff is bound to affign him the bail-bond if he requests it; and if the defendant does not appear in court upon the return of the writ, or within four, and, in some cases, fix or eight days, according to the distance from the metropolis, after the writ is returned, the plaintiff is at liberty to proceed against the bail, in his own name, as affignee of the Sheriff for the penalty of the bond : provided he gets the affignment stamped before his action thereupon is commenced. And it has been adjudged-Firft, That the affignment may be made either by the Sheriff or the under Sheriff, in the name of the Sheriff, even out of the county *. And that the action may be brought where the bail was taken, or the assignment made. Secondly, That an under-sherist's clerk cannot assign the bail-bond |||. Thirdly, That the action on the bail-bond must be brought in the same court from whence issued the process whereon the bail was taken 1. - Fourtbly, That in an action against the bail on their bond, the bail cannot be held to bail, as that would be bail ad infinitum. Fiftbly. That upon such an action, the arrest of the defendant cannot be traversed, for if it might, a bail-bond could never be good, unless the party had been actually arrested in the legal sense of the word +. Sixthly. That in an action on a bail-band the plaintiff need not shew an arrest, For per cur. It would be of mischievous con-fequence, if a bail-bond taken civilly, without exposing the party by an arreft, should not be as effectual as if there had been an actual arrest t .- And Seventhly, That if bail above is excepted to, and new bail is added, and they do not justify, pursuant to the rule of the court, within the limited time, the plaintiff may proceed on the bail-bond without excepting against the new bail &.

But should the defendant appear to the action, and the bail for the appearance are willing to become bail also to the action, and their names are entered accordingly, the court of * King's Bench will not suffer the plaintiff to except to them, if he has previously taken an affignment of the bail-band from the Sheriff; for if he has so done, the court considers it as an implied admission of their sufficiency †. But the plaintiff

^{*} Stra. 727. Ld. Raym. 1455. Fort. 366. ||| Stra. 60. 10 Mod. 288. || 3 Wilf. 348. Barnes 92. Burr. 4 pt. 1923. † Stra. 444. † Stra. 643. § Barnes 74. * But in the Common Pleas they may be excepted against, 2 Barnes 63. † 1 Wilf. 223.

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may in such case call upon them to justify, and unless they do so within the similed time, by the rules of the court, the desendant must put in better bail to the action.

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Of the Affidavit to hold the Defendant to Bail.

HE statute 1.2 of Charles the 2d, before taken notice of did not give relief to defendants profecuted for flight and trivial matters. For the Sheriff even upon a general writ without a clause of " ac etiam" in it, specifying the true cause of action, was authorized upon arresting the defendant, to infift upon bail in a penalty of 40 f. for his appearance at the return of the process. And if the true cause of action was mentioned by an ac etiam clause, the Sheriff could infift upon the bail's entering into a bond for double the debt or damages expressed therein, before he released the defendant from his confinement. But for the prevention of frivolous and vexatious arrefts, the statute 12 Geo. 1. c. 20. enacts, " That no person shall be held to special bail upon " any process issuing out of any superior court, where the " cause of action shall not amount to ten pounds or upwards, " nor out of any inferior court, where the cause of action " shall not amount to forty shillings or upwards in any such inferior court, and that in all cases where the cause of ac-" tion shall not amount to ten pounds or upwards in any " fuch superior court, or to forty shillings or upwards in any " fuch inferior court, the plaintiff shall not arrest, or cause " to be arrested the body of the defendant, but shall serve "him personally within the jurisdiction of the court, with " a copy of the process; and upon the defendant's not " ap pearing at the return thereof, or within four days after, " the plaintiff may, upon affidavit made and filed in the " proper court of the personal service of such process, en-" ter a common appearance, or file common bail for the defendant, and proceed thereon, as if such defendant had entered appearance, or filed common bail himfelf."-And by Sect. 2d. " Inall cases where the cause of action " amounts to ten pounds or forty shillings as aforesaid, offidavit " must be made and filed of fuch cause of action; which " affidavit may be made before a judge or commissioner of " the court out of which fuch process shall issue, authorised " to take affidavits in such courts, or else before the of-VOL. I.

ficer who thall the fuch process, or his deputy; and for fuch affidavit, one thilling over and above the flamp duties thall be paid and no more; and the fum fpecified in fuch " affidavit shall be indorfed on the back of such writ or or process, for which fum to indorted the Sheriff or other officer, to whom the writ or process shall be directed, shall take bail, and for no more. But if any writ or process mall iffue for the fum of ten pounds or upwards, and no affidavit and indorfement shall be made as aforefaid, the ee plaintiff shall not proceed to arrest the body of the defendant, but shall proceed in like manner as is by this act directed in cases where the cause of action does not amount to the fum of ten pounds or forty fillings and upwards as aforefaid."

The affidavit to arrest the defendant and hold him to fpecial ball according to this flatute, must be positive, and not that the defendant is indebted in fuch a fum of money, as appears by agreement, &c.; for it must not be couched in terms of reference, the act requiring a positive oath of the debt in terms of absolute certainty, and not in words of reference to fomething else*. In amendment of this act of Geo. 1. the 5 Geo. 2. c. 27. after reciting the same, and also "that whereas the said process is in a language, for the most part, f unknown to the defendants; and whereas fuch defendants are to appear at the return of the or process, or within four days after fuch return, the thortnels of which time hath been found inconvenient. And whereas affidavit is to be made of the personal service of fuch process, and unnecessary expence and delay hath been occasioned for want of a sufficient number of perfons duly authorized to take fuch affidavits," enacts, That in all cases, where the cause of action shall not amount to ten pounds or opwards in any superior Court, of to forty shillings or upwards in any inferior Court, the writ, process, declaration, and all other proceed-ings, shall be in the English tongue, and written in words at length in a common legible hand and character: And the defendant in such cases, [a copy of fuch process in English having been served, as by the faid act is directed fhall appear at the return thereof, or within eight days after fuch return, and the affidavit of the lervice of fuch process shall and may be made before any led un acticed by him.

Burr. Rep. 4 pt. 1447. and infolled in latin longue need base of a peroceed and only 91036

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"Tudge or Commissioner of the court out of which such " process hall iffue, authorized to take affidavits in such "courts; or elfe before the proper officer for entering common appearances in fuch court, or his lawful deputy and which affidavin is hereby directed to be filed gratis? -And by feet. 2.16 No person shall take more than five 14 fhillings for the making and ferving a copy of fuch procels out of any superior court, or more than one shilling for the making and ferving of a copy of fuch process out of any inferior court." - And by feet . 2. " That in paraicular franchises and jurisdictions, the proper officer there shall execute such process."—And by seel, 4: That upon every copy of fuch process to be served upon " any defendant, shall be written in like manner, an Eng-46 life notice to fuch defendant of the intent and meaning of " fuch fervice, &c." - And lastly, by fed. 5. " Where the cause of action does not amount to ten pounds or " upwards in any superior court, or farty shillings or up-" wards in any inferior court, no special writ shall be " fued out. This act, being only a temporary act, was further continued by the 12 of Geo. 2. c. 20 and made perpetual by the 21 of Geo. 2. c. 3. Since which statute, the 19 of Gea. 3. c. 70. has provided, "That no person " fhall be held to special bail upon any process issuing out " of any inferior court, where the cause of action does not ff, amount to ten pounds or upwards,"

The mention of this statute brings me to the end of this introduction, in which I have endeavoured to shew the Student, though perhaps impersectly, the origin of the jurisdiction of the Courts the process they used, and the alterations occasioned therein at different periods of time. And though the plan I adopted has necessarily compelled me to repeat some things over again, the Student I trust, will not be displeased with me on that account; since, by having so done, the subject matter will not only be the sooner understood, but much better retained.

From what has been said, the Reader cannot but have obferved how backward the Legislature was in making innovations on the common law process to compel the defendant's
appearance, and of depriving a subject of his personal freedom
for any thing less than for offences of a criminal nature.
Nor can it have passed unnoticed by him to what sictions the
courts resorted to savour the arresting a desendant in civil
actions, for the expedition of justice and prevention of fraud,
long before it was expressly authorised by stature. And that
fince such a proceed ng has been authorised, both the Legis-

lature and judges of the courts have taken care that it shall not work to the imprisonment of unfortunate traders, by whom alone the incurring of debts is both necessary and justifiable, but only to the discouragement of prodigality, and discountenance of fraud and dishonesty. For what provision the law did not make for the security of credit and advancement of trade, the wisdom and penetration of the judges who presided in the courts from time to time, happily furnished; and whenever, from the interference of the Legislature, proceedings bore hard on desendants and savoured of rigour, the humanity of the courts always stepped in, and publy rectified them.

As the laws now stand, no really honest though unfortunate trader, can be deprived of his liberty for any duration -No person whatever can suffer inconvenience from being arrested, unless the debt which he neglects or is affwilling to pay amounts to role or upwards, and not even shen unless an oath of it has been taken previous to the awarding the process.—And no one of character, who can procure bail for his appearance in court, can undergo an imprisonment for debtitill the demand upon him has been investigated in due course of law, and twelve of his countrymen have declared that in justice he ought to discharge it. What laws therefore can be devised or enacted more replete with frice juffice and equity, or more galeulated to fecure credit and confidence in dealings, and to promote trade, than those already in being? It any real oppression happens from so them, ocany one is wrongfully imprifored or vexatiously fued, the courts are always open to hear his complaint, and the laws always ready to afford him relief .- The verdict of his dentifymen will give him damages for any prejudice he 101 tyrongfully fuffers from them, and the Judges, who are the best guardians of public liberty] to whom his appeal must be made, and before whom his complaint must be determined, of inever fail to discountenance oppression and vexation committed under the fanction of law; and are fure to direct the jury (in whose breast his recompence lies) to find such damages as will amply repay him for any temporary loss of his freedom, or other injury which he can prove he fultained.

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The Bankrupt alt of Ged. 2. 1. 20. has given a Bankrupt two ways of getting discharged from an imprisonment—first, by pleading his bankruptcy third certificate to an action, commenced against him for a cause or thing before his bankruptcy, if he has obtained his certificate in time—secondly, by applying to a judge for his discharge after judgment obtained against him, if he has got his certificate then.

lature and judges of the courts have taken care that it shall not, work to the inputionment of unfortunate traders, by whom alone the incurring of debts is both necessary and justifiable, but only to the discouragement of prodigality, and discountenance of fraud and discounterly. For what provision the law did not make for the security of credit and advancement of trade the security of credit and judges who presided in the courts from time to time, happily furnished, and whenever, from the interference of the Legistature, proceedings bore hard on desendants and savoured of the lature, proceedings bore hard on desendants and savoured of the lature, the busy the lature of the latur

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As the laws now Rand, no really bonest though unforturate trader, can be deprived of his liberty for any duration
of time *----No person whatever san suffer inconvenience

si to seel an address the was not originally intended of the publication, but only for the immediate use of the Compiler, it is submitted to the Rublicoin print, in the formain which it was written was here was in order on the laws and a second of the compiler, it is submitted to the Rublicoin print, in the formain which it was written was a second or the compiler of the compiler.

As he found it more convenient to begin made every leparate Head with a new page, and to be infert the material differences in the Practice of the two Courts in two leparate and diffinct apages, it happens in print as in the manuscript, that some pages are not so replete with matter has as they might otherwise have been, and that a mesew blank pages appear in the course of the first Volume.—But as this was altogether unavoidable, it is hoped that the apparent utility of this mode will be received as an apology for it.

Taxouchour the whole, the Complier has fludiously avoided inserting any Precedents of Pleadings, Rules, or Writs, unless they tended

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to slucidate the Practice, or explain the particular action in which he was collecting it. For to have written a Declaration in one species of action, and a Plea, Replication or Judgment in another, would have been of no use to himself; and to have engrafted them in the work, when he was persuaded to publish it, would not only have been of little advantage to the Practiser, but would have swelled the work to an unnecessary bulk, by which the practical cases would have been lost in the consuston and multiplicity of precedents.

of practice un icure particulary actions. The ALL who attend the Courts, either to transact business, or for their own information, must be sensible how necessary it is to know the rules and points of Practice laid down by them, for the mutual convenience and benefit of parties, and expedition of Justice: And vet from the books hitherto published on this subject, for want of subdivision and method, a very little portion of that knowledge can be derived. The Compiler having been frequently misled by the many difficulties and inaccuracies in them, was induced to make a book of practice for himfelf, by which he might improve his knowledge of judicial proceedings, and affift his memory. In the plan of this Book he has deviated from every other hitherto published on the same fubject; and being sensible of the great defects in former publications, his principal care has been directed to arrangement and method: fo

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His first Volume he has designed for the Rules and Cases of Practice throughout a civil action, for with criminal matters he has not at all interfered; and his second, for proceedings by and against particular persons, and for points of practice in some particular actions. The whole he has endeavoured to adapt to modern use, and to illustrate those actions only, which from the alterations of the law, by the abolition of military tenures, and disuse of real actions, our courts are at this day chiefly called upon to determine.

With regard to the order of the work, the Reader will observe, that where the practice of the two courts does not materially differ, the cases adjudged in them are engrafted together, but where there is a material difference, each court has its separate page fronting that of the other, and distinguished by the letters B. R. and C. B. at the top; and this distinction is carried on from page to page, where the subject requires it. It was thought proper to premise this, as the method is entirely new. But the Reader will see, that where it was necessary

fo to diffinguish the courts, when cases are inferted which have been determined in one court only, a space has been left for the infertion of a like case on the same point, should any one be hereaster determined in the other.

FAR from recommending these books, as containing no faults or inaccuracies, the Compiler is well aware that some will be found in them; the nature of the subject admitting of no perfect publication. And therefore he offers them to the profession, rather as a plan for a Common Place Book, than as a compleat compendium of all cases and points of practice adjudged; in which view he hopes they will be found serviceable.

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Of the Terms.

HERE are four terms in the year, in which the judges sit in their respective courts in Westminster-ball to hold plea, and determine matters and causes referred to them, viz. Michaelmas Term, Hilary Term, Easter Term, and Trinity Term. The two first of which are called fixed terms, as invariably beginning on certain fixed days in the year; and the two latter moveable terms, their commencement being regulated by Easter Day, and Corpus Christi Day, both of which are moveable feasts, and do not happen on any certain fixed days.

Michaelmas Term always begins on the 6th of November, unless that day happens on a Sunday, and then it begins on the Monday, and ends on the 28th of November, unless that happens also on a Sunday, and then on the

following day.

Hilary Term always begins on the 23d of January, and ends on the 12th of February, unless either of these days happens on a Sunday, and then on the day following.

Easter Term begins on the Wednesday fortnight after Easter day, and ends on the Monday next after the Ascension

day.

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And Trinity Term begins on the Friday next after Trinity Sunday, and ends on the Wednesday fortnight after it begins, except that Wednesday happens to be the feast of St. John Baptist, and then the courts adjourn on the Tuesday till the Thursday.

Of these four terms, two of them, viz. Hilary and Trinity, are called is fuable terms, because in them the issues in causes depending are made up in order for trial at the affizes

which follow them.

In each of these terms there are stated days, called Days in Bank; that is, days of appearance in the Common Pleas, which are generally at the distance of about a week from each other, and regulated by some sestival of the church. On some one of these days in bank all original writs must be made returnable, and therefore they are generally called the Returns of the term; whereof every term according to the Vol. I.

length and duration of it has more or less. But though many of these return days are fixed upon Sundays, yet the court pever sits to receive the returns till the Monday after; and therefore no proceedings can be had, or supposed to be

had on a Sunday.

All these days in bank have a day preceding them called an Essign-day. The first day in bank in term is always the first day of the term in which the court actually sits, as the 6th of November the first day of Michaelmas term, and the 23d of January the first day of Hilary term, &c. But the Essin-day of these first days in Bank is in law the first day of the term, as the 3d of November being the Essign-day of Michaelmas term, and the 20th of January the Essign-day of Hilary Term are in law the first days of their respective terms.

The 3d of November the Morrow of All Souls is the Essign-day of Michaelmas term. The 20th of January, the ottave of St. Hilary, or the eighth day inclusive after the feast of that saint, which is the thirteenth of that month, is the Essign-day of Hilary term *. The Sunday next preceding the Wednesday fortnight after Easter-day, on which Easter-term always begins, is the Essign-day of Easter-term †. But this Essign-day always falling on a Sunday, is held on the Monday following. And the Monday next preceding the Friday after Corpus Christi Day or Trinity Sunday, on which Trinity term always begins, is the Essign-day of Trinity-term ‡.

On the Effoign-day of each term, the courts are opened

by one of the Judges thereof.

The Essign-day was so called from a liberty the party had of sending an excuse for his non-appearance in court according to the summons of the writ. But if he sent no essign or excuse, the court indused him with three days from the return of the writ to make his appearance, and if he appeared on the sourth inclusive, the quarto die post of the return of the writ, the court thought it sufficient, and till then no surther process could issue against him. And for that reason the court does not sit at the beginning of a term for the dispatch of business, till the quarto die post of the first return day of the term in three of the terms. In

† This term also in the Court of Exchequer begins eight days before the full term in the other courts.

^{*} In the Court of Exchequer this term begins eight days before the full term in the other courts.

the full term in the Court of Exchequer begins four days before the full term in the other courts.

Trinity Term, by ftat. 32 Hen. 8. c. 21. not till the fixth

All writs and process founded upon original writs must be returnable on a general return day. - All process by bill on a day tertain in term. - And original writs and process thereon must have fifteen days between the tefte and return, except where it is enacted by 16 Car. 1. c. 6. f. 7. "That the return day, called "The Morrow of the Afcension of our Lord," shall be a good return notwithstand-" ing there be not fifteen days between the fourth day of " the faid return of The morrow of the Ascension of " our Lord, and the effoign-day of the return of The Morrow of the Holy Trinity." And by the 13 Car. 2. flat. 2. c. 2. f. 7. where it is enacted, "That in all per-" fonal actions, and in all actions of ejectment depending " by original writ, there shall not need be fifteen days " between the teste and return of any writ or writs of u venire facias, habeas corpora juratorum, or distringas " juratores, fieri facias, or capias ad satisfaciendum, and that the want thereof shall not be error." But by f. 8. " the act is not to extend to any writ of capies ad fatis-" faciendum, whereon an exigent after judgment is to " be awarded, nor to a capias ad faciendum, against the " defendant, in order to make the bail liable." Whereas, process by bill, needs no certain number of days from its issuing forth till it is returnable.

There are certain days however called "Dies non juridici" on which writs must not be made returnable. In the term of St. Hilary there is one, which is the Feast of the Purification. - In Easter term there is another, which is Ascension-day. And in Trinity term sometimes a third, which is the Feast of St. John the Baptist (if it falls in it) unless it falls on the Friday next after Trinity Sunday, when the

term must begin by the stat. 32 H. 8. c. 21. In the King's Bench when the proceedings are by original, the writ and process thereon are made returnable not only on a general return day, but on a general return day as on the Morrow of All Souls ubicunque, wherefoever we shall then be in England. For that court is removeable with the King at his pleasure. But in the Common Pleas, which is a court fixed and cannot be moved, in the writ and process no such

words are inferted.

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Michaelmas Term, contains three weeks and two days, and hath four returns.

The Return days when the Proceedings are by Original.

- T. On the Morrow of All Souls.
- 2. On the Morrow of St. Martin.
- 3. In eight days of St. Martin.
- 4. In fifteen days of St. Martin.

The Return days when the Proceedings are by Bill.

1. On	(a certain day as) on Monday.	next after the Morrow of All Souls.
2. On	(next after the Morrow of St. Martin.
3. On	(next after the Octave of St. Martin.
4. On	(next after fifteen days from the day of St. Martin.

Hilary Term contains three weeks, and hath four returns.

The Return-days when the Proceedings are by Original.

- 1. In eight days of St. Hilary.
- 2. In fifteen days of St. Hilary.
- 3. On the Morrow of the Purification of the bleffed Virgin Mary.
- 4. In eight days of the Purification of the bleffed Virgin Mary.

The Return-days when the Proceedings are by Bill.

- 1. On (

) next after the * Octave of St. Hilary.

 2. On (

) next after fifteen days from the day of St. Hilary.
- In the Common-Pleas they fay eight days instead of the Octave.

	Dr ti	Of the Cerms.	
and by	3. On (of such disk one or 4. On (of such disk one or on (on one of the original or or or or or or or or or or or or or or or .) next after the Morrow of the Purification of the bleffed Virgin Mary.) next after the Octave of the Purification of the bleffed Virgin Mary.	
	Easter Term contains three five	weeks and fix days, and hath returns.	
	The Return-days when the	he Proceedings are by Original.	
of of	1. In the King's Bench. In the Common Pleas. 2.	In fifteen days of Easter. From Easter in three weeks: In three weeks from the day of	
of om	3. Mill på and mychiles i vid Viddi side sid worstum i bi sed	Easter. From Easter in one month. In one month from the day of Easter.	
ns.	A 4 of the transported with the transport of the transpor	From Easter day in five weeks. In five weeks from the day of Easter. On the morrow of the ascen-	
by	an of the copy affirm His thin	fion of our Lord.	
	The Return-days when t	he Proceedings are by Bill.	
ir-	the first to the following the sales	t after fifteen days from the day f Easter.	
ir-		after three weeks from the	
	3. On () next	ay of Easter. t after one month from the day f Easter.	
' .	4. On () next	after five weeks from the day	
of om	5. On (Monday) next	after the morrow of the af-	

On

B 3

Trinity Term contains twenty days, and hath four Returns.

The Return-days when the Proceedings are by Original;

1. On the morrow of the Holy Trinity.
2. On the Octave of the Holy Trinity.

3. In the King's Bench. From the day of the Holy
Trinity in fifteen days.
In the Common Pleas. In fifteen days of the Holy Tri-

From the day of the Holy

Trinity in three weeks.

In three weeks from the day of the Holy Trinity.

The Return-days when the Proceedings are by Bill.

1. On (Friday) next after the morrow of the Holy Trinity.

2. On () next after the Octave of the Holy Trinity.

3. On () next after fifteen days from the day of the Holy Trinity.

next after fifteen days of the Holy Trinity.

4. On (Wednesday) next after three weeks from the day of the Holy Trinity.

A judgment relates to the Essin-day of the term, which is the first day in law, and not to the quarto die post which is but a day of grace.

Df procels.

Of commencing an Action in the Court of King's-Bench, by Bill.

THE usual method of commencing an action in the court of King's-Bench is by Bill of Middlesex—for which you make out a pracipe, get a blank bill, fill it up and carry it to the bill of Middlesex office, and the officer will sign it. In term you pay 5 d. in the vacation 10 d.

Middlesex—Bill for A. B. against C. D. returnable on the Wednesday next after the Morrow of All-Souls.

25th October 1778.

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John Hall (attorney's name.)

The termination of the control of the

The Bill thereupon.

Middlesex, to wit, The sheriff is commanded to take C. D. and John Doe if they may be found in his bailiwick, and them safely keep, so that he may have their bodies before our lord the king at Westminster, on Wednesday next after the Morrow of All Souls, to answer A. B. in a plea of trespass, and that he have then there this precept.

By Bill.

Stormont and Way. (Chief clerks names.)

This

As the cause of action is not expressed in the above bill, the defendant cannot be arrested thereon, but must be served with a copy thereof, and a notice in writing subscribed, pursuant to the statutes 12 George 1. c. 29. and 5 Geo. 2. c. 27. in order that he may appear to it.

Mr. C. D. you are served with this process, to the intent that you may, by your attorney, appear in his majesty's court of King's-Bench at the return thereof, being the 6th day of November 1778, in order to your desence in this action.

No more than 5 sh. is to be taken for the making and ferving a copy of such process, and no see for the notice, by the stat. 5 Geo. 2. c. 27.

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This is the first process if the defendant lives in Middlesex, and is not to be held to bail: But if the debt amounts to above 10 l. he may be arrested and held to bail, and then an affidavit must be made of the debt pursuant to the above statutes, — which affidavit must be positive, and not couched in words of reference. and then the cause of ac etiam is inserted in the Bill of Middlesex in consequence of 13 Car. 2. st. 2. c. 2.

The Bill of Middlefex with an ac etiam.

Middlesex, to wit, The sheriff is commanded to take C. D. and John Doe, if they may be found in his bailiwick, and them safely keep so that he may have their bodies before our lord the king at Westminster on Wednesday next after the Morrow of All Souls, to answer A. B. in a plea of trespass; and also to a bill of the said A. B. against the said C. for 201. (double the sum sworn to) upon promises according to the custom of the court of the lord the king, before the king himself to be exhibited, and that he have then there this precept.

By Bill.

Stormont and Way.

The ac etiam clause must be suited to the case.

If in debt it is, "And also to a bill of the said A. B. against the said C. for one hundred pounds of debt, according &c."
In Covenant. "And also to a bill of the said A. B. against the said C. for breach of covenant, to the damage of the said A. B. of one hundred pounds, according, &c."

In Trespass. "For taking and carrying away the goods and chattels of the said A. B. to the value of one hundred

pounds according, &c."

In Trover. "For converting and disposing of the goods and chattels of the said A. B. to the value of one hundred pounds, according, &c."

In Detinue. "For detaining the goods and chattels of the faid A. B. to the value of one hundred pounds, ac-

cording, &c."

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In Affault and Battery, where you have obtained a judge's order for holding the defendant to bail. "For beating, wounding, and ill-treating (as the case happens to be) the said A. B. to his damage of one hundred pounds (double the sum ordered by the judge, but indorse the exact sum ordered by him on the writ) according, &c.

[·] Vide what is a sufficient affidavit post.

If against several defendants. "And also to the several bills of the said A. B. against the said C. D. for fifty pounds upon promises; and against the said E. F. for twenty pounds of debt, according, &c.

If the action is on a recognizance of bail, the ac etiam clause must be inserted, though the defendant, in such case, is only to be served with a copy of the process, and is not to be arrested upon it, otherwise by rule of court, Easter, 15 Geo. 2. the defendant or his attorney shall not be bound to accept of a declaration upon such recognizance.— And also to a bill of the said A. B. against the said C. D. in a plea of debt upon recognizance, according, &c."

If the sheriffs are parties, the bill is directed to the coro-

ners of the county.

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The Bill of Middlesex is only a precept and not a writ,

having only a return and no teffe.

In case the sheriff cannot take the defendant on the bill, you make out an alias bill similar to the first bill, only beginning, "Middlesex, to wit. It is commanded to the sheriff, as it was before commanded to him, that he take, &c." And should he not be taken on the alias bill, you make out a pluries bill, which begins thus: "Middlesex, to wit, It is commanded to the sheriff, as it has been oftentimes commanded to him, that, &c."

If the defendant lives in any liberty within the county of Middlesex from which the sheriff is excluded, get the sheriff to direct his warrant to the bailiff of that liberty, in order to arrest the defendant; and if the bailiff of the liberty does not execute it, get the sheriff to return a mandavi ballivo on the bill, after which make out a non omittas bill, by virtue whereof the sheriff may then enter the liberty and arrest the

defendant.

A non omittas bill begins in this manner:

"Middlefex, to wit, It is commanded to the fheriff, that he do not omit by reason of any liberty in his county; but that he take C. D. if he may be found in his bailiwick, &c."

The non omittas bill is general, empowering the sheriff to enter notwithstanding any liberty; but when a non omittas capias is sued out of the court of Common Pleas, it only gives him authority to enter a particular liberty, and specifies it in this manner: "That you do not omit by reason of any liberty, of the liberty of Lancaster in your county, but that you take, &c."

Of commencing an action in the court of King's Bench by Latitat.

Of the Latitat.

If the defendant lives out of Middlesex, you take out a Latitat, which is a Testatum bill of Middlesex, and grounded on a supposed return of non est inventus made by the sheriff to a bill of Middlesex before sued out; to obtain which, you make out a note or præcipe, get a blank and fill it up and carry it to the King's Bench office for the officer to sign, for which you pay 2 s. 6 d. The Latitat must also be sealed, for which 7 d, is paid.

London, to wit. Latitat for A. B. against C. D. Tref-

pass returnable, &c.

25 October 1778.

John Hall (attorney's name.)

If the defendant is not to be held to bail, you serve him with a copy of the writ, with a notice subscribed as is be-

fore mentioned to the bill of Middlesex.

If the defendant is to be held to bail fay, "and also "for one hundred pounds upon promise," or whatever the case is, and then the clause of "ac etiam" must be inferted in it after affidavit made pursuant to the statutes. The affidavit must be carried to the office at the same time, and the sum sworn to endorsed on the writ,

The Latitat when the defendant is to be arrested runs thus:

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. To the sheriffs of London, greeting. Whereas we lately commanded our sheriff of Middlesex, that he should take C. D. if he might be found in his bailiwick, and him safely keep so that he might have his body before us at Wesiminster at a certain day now past to answer A. B. in a plea of trespass,

[·] Or whatever county the desendant resides in.

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and also to a bill of the said A. B. against the said C. D. for one hundred pounds upon promise, according to the custom of our court before us to be exhibited; and our faid sheriff of Middlesex at that day returned to us that the aforesaid C. D. was not found in his bailiwick. Whereupon. on the behalf of the aforesaid A. B. it is sufficiently attested in our court before us, that the aforesaid C. D. doth run up and down and secrete himself in your county; therefore, we command you that you take him if he may be found in your bailiwick, and fafely keep him so that you may have his body before us at Westminster on Monday next after the Octave of St. Hilary, to answer to the aforesaid A. B. of the plea and bill aforesaid. Witness William Earl Mansfield, at Westminster the 15th day of November, in the nineteenth year of our reign.

Stormont and Way:

If the defendant is not to be held to bail, the clause of "ac etiam", may be left out, and the same notice must be added as is to the bill of Middlesex, and the party served with a copy.

Either the bill of Middlesex, or the Latitat, may be made returnable the day after they are sued out. 2 Stra. 917. 2 Barnard K. B. 60. and may be served at any time of the return day. Burr. Rep. 812. But if made returnable the same day as sued out, it is ill, and will not avoid the statute of limitations. L. Raym. 772.

If the defendant cannot be taken on the Latitat, you may sue out an Alias capias, a writ similar to the alias bill of Middlesex,

The Alias capias runs thus.

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. To the sheriffs of London, greeting. We command you as we have before commanded you, that you take C. D. if he may be found in your bailiwick, and safely keep him so that you may have his body before us at Westminster, on next after to answer to A. B. of a plea

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of trespals; and also to a bill of the faid A. B. against the faid C. D. for one hundred pounds, upon promifes, according to the cuftom of our court before us to be exhibited. and have there then this writ. Witness William Earl Mansfield, at Westminster, the in the day of year of our reign.

Stormont and Way.

If the defendant cannot be taken on this Alias capias, you may fue out a Pluries capias, which only differs in the beginning, inferting the words, " as we have many times " commanded you," instead of "as we before commanded " you."

If the defendant lives in a liberty into which the sheriff cannot enter without a special authority, get him to return Mandavi Ballivo if the bailiff has not executed his warrant, and then you may fue out a Non omittas Latitat, which runs thus.

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. To the sheriff of fender of the faith, &c. To the merin of greeting. We command you that you do not omit by reason of any liberty in your county, but that you take C. D. if he shall be found in your bailiwick, and keep him fafely fo that you may have his body before us at Westminster, on next after to answer A. B. of a plea of trespass, and also a bill of the said A. against the said C. for one bundred pounds of debt, according to the custom of our court before us to be exhibited, and have there then this writ. Witness William Earl Mansfield, at Westminster, the in the nineteenth year of our day of reign.

Stormont and Way.

If the defendant lives in a County Palatine, or in a Cinque Port, the writ is directed to the Superior officer who has the execution of process there, as to Durham, the writ is directed

To the reverend father in God, by permission, bishop of Durham, or to bis shancellor there, greeting, &c.

To Cheshire.

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To the chamberlain of our county palatine of Chester, or to his deputy there, &c.

To the city of Chester. To the sheriffs of the city of Chester.

To Lancaster. To our chancellor of our county palatine of Lancaster, or to his deputy there, &c.

To a Cinque Port. To the constable of Dover Castle, or his deputy, there, &c.

In Easter 11 Geo. 2. It was contended by the bishop of Durham, into whose palatinate a Latitat had been sued, but which the bishop's officer refused to execute, upon pretence that no process would run there, but from the Exchequer ; that a Latitat from the King's Bench did not run there. But the court declared that they would never endure, that the officer should refuse to receive their process, whatever might be the case if it came properly before them upon a claim of conusance, or plea to the jurisdiction; and made the rule for an attachment against the officer absolute. - The court faid the true meaning of the expression, breve Domini Regis non currit, is, that the court cannot write directly to the sheriff as they do in other cases. Stra. 1089.

A Latitat does not run into Wales. 1 Wilf. 193.

It was the opinion of the court of B. R. that the ferving of a copy of a Latitat issuing out of that court into a County Palatine, was good, and that the party need not have a mandate from the chamberlain of the Go. Pal. upon the Latitat. For the words in the act 5 Geo. 2. c. 27. " Pro-" vided nevertheless, that all process shall be executed by " the proper officer of each franchife," cannot be construed to extend to Counties Palatine, but to fuch franchises or particular districts in each county, into which the sheriff cannot enter but by writ of Non smittas. The act fays, that fervice of such process, if the defendant does not appear, is to be confirmed by an affidavit made before a judge, or commissioner of the court from whence the process issued; which, if the chamberlain's mandate was to iffue on the Latitat, and a copy of that served on the defendant, must be sworn before the chamberlain or a baron of the Exchequer there, and consequently could not be read in this court. 2. Barnard K B. 318, 337, 398. 2 Keb. 160. pl. 133. And, 199, a. . had et al. Den ben bet de de de de de de de of color of the sales can and for contraction to

Of profecuting a personal Action in the Court of King's Bench by Original Writ.

T was shewn in the introduction of this book, in what manner the court of King's Bench obtained cognizance of some civil actions, by procuring an Original Writ to be made returnable there, and therefore need not

here be repeated.

The civil actions which may be commenced and profecuted in the court of King's Bench between subject and fubject by Original Writ, are, case, trespass, ejectment, replevin, and debt; but quære debt, though it feems to be the better opinion that debt lies in B. R. by Original; but it is faid, that no other action can be profecuted in the King's Bench by Original Writ between subject and subject in the first instance, but all actions may be removed thither from inferior courts by writs which are in their nature Original, and made returnable there, as writs of error, certiorari, recordari facias loquelam, accedas ad curiam, &c.

Se Softward. In suing by Original in the King's Bench, a plaintiff will a XCVIII find in some cases greater advantages than in suing by Bill, or Latitat, which presupposes a Bill, as if a defendant is difficult to be arrested, and will not satisfy a legal demand, a plaintiff may proceed to outlaw him. - So, if he fues a body corporate or hundredors upon the statutes of hue and cry, who cannot be arrested, because in suing by Original he may have process of attachment and distress infinite to compel an appearance. - So, if he sues a peer or privileged perfon, who by reason of his dignity is not to be arrested for any civil matter whatever. But of proceeding to outlawry also of proceedings against peers, members of purliament, bodies corporate, &c. See the second volume.

In fuing also by Original Writ in the actions which the court of King's Bench can hold plea of by Original, there is this further advantage than in suing by bill; for in case a writ of error is brought, upon a judgment obtained in a fuit by Original there, it must be made returnable in the High Court of Parliament, and not in the Exchequer Chamber, as it is when a writ of error is brought upon a judgment obtained in the King's Bench on a fuit commenced by Bill,

by virtue of the stat. 27 Eliz. c. 8.

However, a plaintiff seldom sues in this court by Original, unless the action is founded on a contract where he can arrest the defendant and hold him to bail; or if that cannot be done proceed to outlaw him, and for that reason the

TE XCYHL

action of assumptit or trespass upon the rase upon promises, is the action most usually prosecuted here by Original; the action of debt not being prosecuted here by Original (which perhaps is the reason why some have thought it did not lie) because the plaintiff in suing by Original in debt would be obliged to pay the fine due to the king in proportion to his demand, to the Cursitor upon suing out the Original Writ.

The method of fuing by Original in this court, being exactly similar to that of suing in the Common Pleas, I shall proceed to shew the manner of commencing and profecuting personal actions there, when the plaintiff does not intend

to proceed to outlaw the defendant.

Of profecuting a Personal Action in the Common Pleas.

A LL actions in this court are commenced, or supposed to be commenced, by an Original Writ out of Chancery made returnable here, for this court has no original jurisdiction (except where its own officers are parties) as the King's Bench has, but derives its jurisdiction from the Court of Chancery, where the subject may at all times apply, and purchase a writ adapted to his particular case.

The method of commencing a personal action in the Common

Pleas is as follows.

Where the cause of action does not require bail the plaintiff's attorney makes out a præcipe for a Common Capias in trespass in this manner:

> Middlesex. Capias for A. B. against C. D. late of the parish of St. Martin in the fields, in the county of Middlesex, butcher, broke the close at Westminster.

Returnable on the Octave of St. Hilary.

1 Decem. 1778.

I. K.

This pracipe is to be carried to the proper Philazer, who makes out the capias, and at his leizure procures the Original Writ from the Curfitor afterwards, to warrant it, which he returns and files of course. The capias is in the following form.

GEORGE

GEORGE the third, &c. To the sheriff of Middlefex, greeting, We command you that you take C. D. late of the parish of St. Martin in the fields, in your county, butcher, if he shall be found in your bailiwick, and keep him safely, so that you may have his body before our justices at Westminster, on the Octave of St. Hilary, to answer A. B. in a plea, Wherefore with force and arms he broke the close of the said A. .. Westminster, and other injuries did to him to his great damage and against our peace. Witness Sir William De Grey, Knight, at Westminster the 29th day of November, in the 19th year of our reign.

The fees upon fuing out are, original 1 s. filing 4d.

capias 10d. duty 2 s. feal 7d.

A copy of this process must then be made out with an English notice subscribed (as where you sue by Bill or Latitat in the King's Bench, in case where the party is not to be arrested and held to bail) pursuant to the stat. 5 Geo. 2. c. 27. of the intent thereof; which must be served upon the desendant in the following manner:

C. D: you are ferved with this process, to the intent that you may, by your attorney, appear in his majesty's court of Common Pleas at the return thereof, being the _____ day of ____ (specifying the day it is returnable) in order to your defence in this action.

In this notice to appear, the very day of the return of the process must be inserted, altho' it should happen to be on a Sunday. Barnes 205, &c. And by the same stat. 5 Geo. 2. no more than 5s. is to be taken for the making and serving a copy of such process, and no fee for the notice; and by the same stat. in particular franchises and jurisdictions, the proper officer there shall execute process: But if the process be not served by the proper officer, the court will not stay proceedings, but leave the lord of the liberty to seek his remedy by action if he thinks proper. Barnes 290. Prast. Reg. 345, &c.

On a common capias quare clausum fregit, a plaintist may declare in any county, or for any cause of action, as his case may require; also by a common capias without the clause of "ac etiam" a defendant may be outlawed, but then he

may reverse such outlawry without bail, and therefore a defendant at this day is feldom proceeded against to outlawry by the common clausum fregit. But of outlawry, see the second volume.

But if the cause of action is above 10 l. and the defendant is to be arrested and held to special bail, affidavit must be made and filed of the cause of action pursuant to the statutes 12 Geo. 1. c. 29. and 5 Geo. 2. c. 27. perpetuated by 21 Geo. 2. c. 3. [vide the form of such affidavit, before whom to be made, where special required, &c. under title Special Bail, post. p.

Where such affidavit is made, the ac' etiam clause is inferted in the capias, when the plaintiff does not mean to proceed to outlawry, [in like manner as it is in the bill of Middlesex and Latitat in the King's Bench] in consequence of the stat. 13 Car. 2. stat. 2. c. 2. and then the pracipe for the capias is in this form.

Middlesex. Capias for A. B. against C. D. late of the parish of St. Martin in the fields, in your county, butcher, broke the close at Westmin-ster, and also in a certain plea of debt upon demand for 80%.

Returnable, &c,

L. M. by N. O. Affidavit for 40s. 26 May, 1778.

The capias thereon.

The præcipe with an " ac etiam" in case upon promise is in the following form:

> Middlesex. Capias for A. B. against C. D. late of the parish of St. Martin in the fields, in your county, butcher, broke the close at Westminster, and also in case upon promise for 100%.

The capies thereon:

GEORGE the third, &c. To the theriff of Middlesex, greeting. We command you that you take, &c. [as above in the former capias] and also that the said C. may answer the said A. according to the custom of our court of the bench, in a certain plea of trespass on the case, upon promise, to the damage of the faid A. of one hundred pounds, and have there this writ. Witness, &c.

The pracipe with an ac etiam, in case upon promises against two defendants.

> Middlesex. Capias for A. B. against C. D. late of St. Martin in the fields, butcher, and E. F. late of the same place, hosier, trespass; and also against C. D. for 100% upon promise; and also against the said E. F. for 100 l. upon promise.

In a pracipe for an affault, fay, " in a plea of trespass and

affault."

And if by a Judge's order upon an affidavit made of an atrocious battery, the defendant is to be held to bail, fay, " and also in trespass and assault to the damage of the faid " A. of 400 l." bail by order for 200 l. on affidavit.

A pracipe for a writ in covenant.

Middlesex. Capias for A. B. against C. D. late of Westminster, in your county, gent. otherwise called (as in the indenture) in a plea that he perform to the faid A. the covenant made between tween them, according to the force form and effect of a certain indenture made between them.

Ret'

A pracipe for a writ in account, as receiver.

Middlesex. Capias for A. B. against C. D. late of, &c. that he render to the said A. his reafonable account for the time in which he was receiver of the money of the said A. &c.

A pracipe for a writ in annuity.

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Middlefex. Command C. D. late of, &c. that he + render to A. B. 100 l. which are in arrear to him for a certain annuity of 50 l. which he owes him and unjustly detains, &c.

Ret'

A præcipe for a writ in debt.

Middlefex. Command C. D. late of, &c. that he render to A. B. 5001. which he owes him and detains.

Ret'

If the defendant cannot be taken on the first writ, or served with a copy of it, as the case happens to be, before the writ is spent, and you do not propose to outlaw him, you sue out a capias by continuance; the pracipe for which is the same as before, only, instead of saying, "capias for "A. B. you say, "capias by continuance for A. B. &c." and the writ is exactly the same as the first.

As these writs are made out by the Filaner, the forms of which may be easily conceived from the foregoing precedents, I shall decline inserting any more of them.

[&]quot; Or if bailiff, fay bailiff. - Or bailiff and receiver.

[†] In all pracipe's quod reddat, if the sum exceeds 401. a fine is due to the king upon suing out the original in proportion to the sum demanded swide the introduction.] Therefore a pracipe quod reddat in debt annuity, &c. is seldom at this day sued out, as the plaintiff may arrest the defendant by a capias, with a clause of a cetiam in debt, and thereby avoid paying the sine, as the writ is supposed to go for the trespass.

If the defendant does not live in the county where you intend to try the action, and he is to be held to bail, there must be a Testatum capias sued out, directed to the sheriff of the county wherein he resides. Which Testatum capias is made out by the Filazer for that county where you intend to try the action; as if the defendant lives at York, and the plaintist would have his cause tried in Middlesex, you make out a pracipe for the Filazer for Middlesex, in order for a testatum capias in this manner, without first suing out a capias.

Middlesex. Capias for A. B. against C. D. late of the city of York, grocer, broke the close. in Middlesex. Returnable on the Octave of St. Hilary.

City of York. Testatum capias, and also for 2001.

upon promise. Returnable on the Octave of the Purification.

O. P.

1 March 1780.

Teftatum Capias.

GEORGE the third, to the sheriffs of the city of York, greeting. We command you that you take C. D. late of the city of York, grocer, if he shall be found in your bailiwick, and keep him fafely, fo that you may have his body before our justices at Westminster, on answer A. B of a plea, wherefore with force and arms he broke the close of the faid A. B. in Middlesex, and did other injuries to him, to the great damage of the faid A. and against our peace; and also that the said C. answer the faid A. according to the custom of our court of the Bench, in a certain plea of trespass upon the case [or whatever the action is] on promise, to the damage of the faid A. of two hundred pounds. And whereupon our sheriff of Middlesex returned to our justices at Westmintter at a certain day now past, that he the said C. was not found in his bailiwick; whereas it is testified in our said court; that the said C. doth you

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lie hid, and run from place to place in your county; and have there this writ. Witness, &c.

So there must be a Testatum capias if the defendant removes out of the county into which a capias had been diriected, and the plaintiff would arrest him and hold him to bail.

If he cannot be arrested on the testatum writ, the plaintiff may sue out a Pluries capias. If the defendant lives in a liberty which the sheriff cannot enter, you may sue out a Non omittas capias, to empower him to enter the liberty.

The Non omittas capias in C. B. is in this form:

GEORGE the third, &c. To the sheriff of - greeting. We command you that you do not omit by reason of any liberty of the liberty of -- [specifying it by name] in your county, but that you take C. D. late of, &c. if he shall be found in your bailiwick, and that you keep him safely, so that you may have his body before our justices at Westminster, on to answer A. B. of a plea, wherefore with force and arms he broke the close of the faid A. at - and did other injuries to him, to the great damage of the faid A. and against our peace. And also, that the said C. may answer the said A. according to the custom of our court of the Bench in a certain plea of debt upon demand for 30 l. [or whatever the action is] and whereupon you returned to our justices at Westminster at a certain day now past, that the bailiff of the aforefaid liberty, whom you commanded, by virtue of our faid writ to you thereupon directed, to take the faid C. gave you no answer thereto; and have there, &c.

If the defendant lives in a county Palatine, or the Cinque Ports, there must be a Testatum writ directed to the Chancellor or Chamberlain, &c. of the county Palatine, as original writs do not run there; i. e. the court does not immediately write to the sheriff as in other cases. Stra. 1089.

If in the county Palatine of Lancaster, the writ is directed, To the Chancellor of our county Palatine of Lancaster, or to his deputy there.

If in Cheshire, To the Chamberlain of our county Palatine of

Cheffer, or to bis deputy.

If in Durham, To the reverend father in God, _____ by permission, Lord Bishop of Durham, or to his Chancellor there, greeting, &c. and instead of saying in the writ, "our County Palatine," say, "Your Bishoprick."

If in the Cinque Ports, To our Constable of our castle of

By the 2 Geo. 2. c. 23. f. 22. It is enacted, " that every

Dover, or to his deputy there, greeting.

writ and process for arresting the body, and every writ of " execution, or fome label annexed to fuch writ or process, and every warrant that shall be made out upon any such writ, process, or execution, shall, before the service or execution thereof, be subscribed or indorsed with the name of the attorney, clerk in court, or follicitor, written in a common legible hand, by whom fuch writ, of process, execution or warrant respectively, shall be sued forth; and where fuch attorney, clerk in court, or follies citor, shall not be the person immediately retained or employed by the plaintiff in the action or fuit, then also with the name of the attorney or follicitor fo immediateif ly retained or employed, to be subscribed or indorsed and written in like manner: and that every copy of any writ or process that shall be served upon any defendant, " shall, before the service thereof, be in like manner sub-" feribed or indorfed, with the name of the attorney or 66 follicitor who shall be immediately retained or employed " by the plaintiff in fuch writ or process." By 12 Geo. 2. c. 13. f. 4. It is further enacted, " That the not subscribing or indorsing the name of the attoret ney, clerk in court, or folicitor, on any warrant that " shall be made out upon any writ, process, or execution, " fhall not vitiate the same; but such writ, process, and er execution, and all proceedings thereon, shall be as valid 44 and effectual, notwithstanding such omission, as if the se faid recited act [i. e. the 2 Geo. 2. c. 23.] had not been " made; provided the writ whereon fuch warrant is made " out be regularly subscribed or indorsed according to the " faid act; and every sheriff or sheriffs, or other officer, " who shall make out any warrant upon any writ, process, or execution, and shall not subscribe or indorse the " name of the attorney, clerk in court, or follicitor, who fued out the fame, shall forfeit the sum of five pounds, to be " aff. ffed

A II " affessed as a fine upon such sheriff or sheriffs, or other of-" ficer, by the court out of which fuch writ, process, or " execution hall iffue; one moiety thereof to be paid to " his majefty, his heirs and fuccessors, and the other moiety " to the person or persons aggrieved by such omission."

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But note, if no attorney's name is fet to the writ or process, it is no ground to move to flay proceedings. Barnes. 407.

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Of the Original Writ, and herein of the teste and return.

A LL process returnable out of term is * void. 1 Stra.

When the proceedings in the court of Kings Bench are by Original Writ, the practice thereon is exactly the same as in the court of Common Pleas; therefore see the opposite page,

^{*} But where a swrit of inquiry was returnable at a day out of term, the writ being executed in term, it was held to be amendable, though after error brought, and that affigned for error in Cam. Scace.—For, per Holt. C. J. If the award of the writ of inquiry on the roll is good, the writ itself shall be amended by the roll; so if the writ be good, and the award ill, it shall be amended by the writ, Hammond v. Pursell. Carth. 70.

Of the Original Writ, and herein of the teste and return.

THE same in this Court.

An Original Writ must not bear teste before the cause of

action * accrued. 2 Burr. 967.

It may be tested at any time in vacation, but must be returnable on a general return day in term, and must have sisten days between the teste and return. The reason why there ought to be fifteen days between the teste and return of original writs is, because every day a man may go a day's journey, which in law is accounted twenty miles, and is called Dieta; and, according to that computation, sisteen days are a convenient time for a man to appear, in whatsoever part of the kingdom he lives. 2 Instit. 267.

But, though fifteen days are required between the teste and return of an original writ, the want thereof is made good by the defendants pleading in chief. Ld. Raym. 671. though

an outlawry upon fuch writ would be erroneous,

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That is, if plaintiff proceeds to outlawry, but if he does not mean to proceed to outlawry, a capias may bear teste before the original, and even before the cause of action accrued, so long as it is actually taken out afterwards; for you cannot have over of the capias so as to take advantage of it. Barnes 173. and so held in B. R. East. 18 Geo. 3.

Of the Latitat, and herein of the teste and re-

FOUR defendants, and no more, may be put into one

C writ.

A Latitat may be fued out before the cause of action accrues, but the defendant must not be arrested upon it before it has accrued. Practice B. R. 77. Whereas if an original writ bears date before the cause of action accrues, it is abateable.

A Latitat must bear Teste in term, though it is sued out in vacation, and must be made returnable on a day certain in

term, and not on a general return day.

An Alias capias, or Pluries must not be tested before the quarte die post, of the return of a preceding writ. 2 Jones 200. Atty. Pratt. 277.

On figning an Alias pluries or Non omittas, the clerk must subscribe under it the term when the Latitat issued. Reg. Tr.

1656.

No certain number of days necessary to be between the teste and return of a special Latitat, and even one day is sufficient if it can be served. 2 Stra. 917.

Service of a writ any time on the return day is good.

4 Burr. 812,

But if a bill of Middlesex or Latitat are made returnable the same day, as sued out, it is bad, and will not avoid the statute of limitations. Ld. Raym. 772.

If the process is not bailable, and the defendant's name is not put before the notice, it is irregular. Prac. B. R. 81.

The name of the plaintiff's attorney must be indorsed on the writ; but if not indorsed on the sheriff's warrant, it will not vitiate it. *Prac. B. R.* 80.

If the process is bailable, the day and year of figning it

muft be fet down on it. Prac. B. R. 79.

Where the true time of fuing out a Latitat is material (as if the statute of limitations be pleaded) it may be shewn notwithstanding the teste of it. 4 Burr. 963.

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Of the Capias, and herein of the teste and return of the writ, &c.

FOUR defendants, and no more, may be put into one writ.

A Capias must be tested in term, and returnable on a geneneral return day in term. I Barnes 295. Prac. Reg. 436: and must have sisteen days between teste and return; but if it has not, it is error, and not an irregularity, therefore the court will not quash it. Barnes 409.

But where a Capias was tested 11th June and returnable in eight days of the Holy Trinity, which was the 13th of June, the court, on motion to set aside the proceedings thereupon,

gave the plaintiff leave to amend it. 3 Wilf. 454.

Although the court cannot amend an original writ because it issues out of Chancery, yet it can amend all mesne process, and also can amend an attachment of privilege which is in the nature of an original writ. For no error can be assigned in

mefne process. Carty v. Afbley. 3 Wilf. 454.

But unless plaintiff means to proceed to outlawry, the Capias may bear teste before the original, and even before the cause of action accrued so long as it is actually taken out after, for you cannot have over of the Capias so as to take advantage of it. Barnes 173. But if plaintiff intends to proceed to outlawry, the Capias must bear teste the quarte die post of the return of the original.

The name of the plaintiff's attorney must be indorsed on the writ. 2 Barnes 329.—but see Prac. Reg. C. B. 449. cont.

But if not indorsed on the sheriff's warrant it will not vitiate it. Ibid. 327.

If the date of the writ is omitted, it is ill. Ibid. 337.

The notice to appear must be certain, and where it was the 19th June, without saying next, or 1747, which was the year, it was held ill. Ibid. 336. Prac. Reg. C. B. 347. sed quære?

A copy must be served before the return day. Ibid. 330. Supplement to the same, 53. Prac. Reg. 352.—But in Easter term, 8 Geo. 3. the court declared that service of message process on the return day shall be deemed regular. 2 Wilf. 372.

Of the Latitat, and herein of the teste and return of the writ, &c.

If the writ is general, and the count as executor, or quitam, or as affignee of the sheriff, yet it is good.

But the Latitat being trespass and assault only, and the count trespass, assault, and battery, judgment was set aside.

Barnard. B. R. 226. 329.

The process was, "to answer the plaintiff qui tam pro domino rege quam pro seipso sequitur"; and the declaration was in his own name only, omitting the qui tam part; and the court held the variance fatal, and accordingly the proceedings were fet aside. 4 Burr. 2417.

But master Benton thought, and the court inclined, that the converse would have been otherwise; as, if the process had been "to answer the plaintiff singly" he might have de-clared tam pro seipso, quam pro domino rege. ibid.

Of the Capias, and herein of the teste and return of the writ, &c.

A Defendant must be served with a copy of the capias, and not of original. Prac. Reg. CB. 342.

The notice must be to appear on the Essign-day, though

that is on a Sunday. Ibid. 346.

If the defendant lives in a county palatine, yet he must be served with process out of the original court. Prac. Reg. C. B. 344. and not with a copy of the mandate, &c.

Not necessary that the service should be by the sheriff's

officers. Pract. Reg. 345.

Though process is served by the sheriff within a liberty, yet it is well. Ibid. 1 Barnes 290. but the proper officer ought to execute such process. Stat. 5 Geo. 2. c. 27.

Though the process served on the desendant is not directed to the sheriff, yet the court will not stay proceedings

as irregular. I Barnes 201.

Wherever process is served, tho' the debt is above 10 l. there must be notice to appear. 1 Barnes 291. Prac. Reg. 349.

The notice must be directed to the defendant by the same

name as the process. Prac. Reg. 348.

The writ need not be shewn on service. ibid. 353. I Barnes 222.

Defective notice may be complained of any time before

judgment. Pract. Reg. 348.

Irregularity in service of process may be complained of any time before interlocutory judgment, but not after.

Pract. Reg. 355. 2 Barnes 211.

If process is served on a wrong person, this is not helped by the plaintiff's entering an appearance according to the statute. I Barnes 294. — But by Pract. Reg. 348. a mistake in process is cured by the plaintiff's entering an appearance, which is as effectual and valid as if entered by the defendant.

If the plaintiff's attorney's name is omitted in process, this is not cured by the plaintiff's entering an appearance for

the defendant. 2 Barnes 329.

If the process be against baron and seme, service on the busband is sufficient for both, and if the husband does not appear for himself and his wife, the plaintiff may enter an appearance for both. Rich, Prac. C. B. 1 Vol. 76.

If it be a joint action against two or more persons, each defendant must be served with a copy of the process.

The writ was general, and count as executor.—And on motion to fet aside the proceedings for irregularity, with costs, the court held that the plaintiff might proceed in his action, but lost his bail. Hamey v. Sparing. 10 Geo. 3.

So where the writ was general, and count qui tam.

Lloyd, who &c. verf. Williams. Mich. 11 Geo. 3.

In process against husband and wise, if they are only to be served, service on husband alone is good service. Barnes 406.

Df the Arreft.

Of the Arrest and Bail to the Sheriff.

HEN the sheriff or his officer has arrested the defendant by virtue of the Bill of Middlesex, Latitat, Capias, &c. he must go to prison if he cannot give bail for his appearance at the return of the process. But the sheriff must take reasonable bail if it be tendered, otherwise an action lies against him by the defendant.

The sheriff indeed, if he pleases, may let the desendant go without any security, after he has arrested him; but then he is liable, upon default of the desendant's appearance at the return of the writ, to an action at the suit of the plaintiff in the original action for an escape: So if he did not arrest him when he might and had him in view.

A bail-bond executed after the return of the writ is void

by the stat. I Ld. Ray. 353.

The method of putting in bail to the sheriff is by entering into an ob'igation called a bail-bond, with two sureties usually, for insuring his appearance at the return, to this effect:

KNOW all men by these presents, That we C. D. of, &c. E. F. of, &c. and G. H. of, &c. are held and firmly bound to Esq. Theriff of the county of Middlesex, in the sum of (double the sum indersed on the writ) of lawful money of Great Britain, to be paid to the said sheriff or his attorney, executors, administrators, or assigns, for which payment

ment well and truly to be made we bind ourfelves, and each of us for himself, in the whole, our and every of our heirs, executors, and administrators, firmly by these presents. Sealed with our feals, and dated &c.

THE condition of this obligation is such, that if the above bounden C. D. do appear before our Lord the king at Westminster, on, &c. [if by bill, &c. a day certain, if by original, a general return day] to answer to A. B. in a plea of trespass, and also to, &c. — according to the custom, &c. — then this obligation to be void, otherwise to remain in full force and virtue.

The bail-bond is on a double fixpenny stamp; and the fum indorfed usually written in the margin of the bond.

When this bond is entered into, the defendant is discharged from the arrest, and left to his option to appear according to the exigency of the process.

If he does not appear, the plaintiff proceeds, as will be

shewn hereafter in its place.

A bail-bond to appear to a writ returnable out of term, is void on the face of it. Stra. 399. Fort. 363.

Of the affignment of the bail-bond to the plaintiff, and
Of proceeding on the bail-bond, post.

Of Common Bail.

Of Common Bail or Appearance.

HEN the defendant has been ferved with a copy of the process, he has in all cases eight days exclusive of the day of the return of the process to file common-bail. Prac. B. R. 84. 4 Burr. 56.

If the defendant does not file common bail in that time the plaintiff may, on affidavit made of perfonal service of process. Prac. B. R. 83. But then these words must be written in the bail-piece, "Filed according to the Statute." i. e. the stat. 12. Geo. 1. c. 29. Prast. B. R. 85.

The form of a common Bail-piece.

Michaelmas term in the 19th year of King George the third.

Middlesex (to wit) C. D. is delivered to Bail upon a Cepi Corpus.

To John Doe of London, gent.

Richard Roe of the same place, gent. E. F. attorney for defendant.

At the fuit of A. B.

This is to be written on a piece of parchment of the above form, with a triple fixpenny stamp, and filed with the clerk of the common bails in the King's Bench office, for which must be paid, whether filed by plaintiff or defendant in term, or within fix days after, 1 s. 2 d. if after that time, 4 d. more for a post terminum.

Df Common Bail.

Of Common Bail or Appearance.

THE same in this court. Atty. Prac. C. B. 91. to enter his appearance.

The same in this court.—And if the plaintiff enters an appearance for the desendant before the time, the desendant has to enter appearance for himself (viz. eight days exclusive of the return day) the desendant must complain of this irregularity before judgment signed, otherwise he will be too late. Prac. Reg. C. B. 355. 2 Barnes 211.

If the defendant's attorney undertakes to appear in this court, he has four or eight days only from the return day of the writ. Reg. 6. Geo. 1.—

But if he does not undertake to appear, he has eight days from the return of the writ in all cases.

In the Common Pleas, common appearances to writs a made out by the philazers are entered with the philazers, for which are paid 2 s. if one defendant, viz. 1 s. for the king'sduty, and 1 s. for entering the appearance; and 4 d. for every defendant more than one.

Vol. I.

Of Common Bail or Appearance.

If a defendant voluntarily appears at the suit of any plaintiff in any action here in court, such appearance shall be of no effect, unless some process be sued out in sourceen days next after such appearance. Tr. 4 W. & M.

If on a defendant's not appearing to a writ of Eafler term, and the plaintiff files common bail as of Trinity Term, the cause is out of court, and judgment must be set aside.

Burr. temp. H. 138.

Where common bail is filed by an attorney according to the statute, it is not such a general bringing of the defendant into court, as to warrant delivering a declaration by the bye. And, to prevent mistakes, it ought always to be added to the bail-piece, that it was filed by the plaintist pursuant to the act. Stra. 1027.

Attorney appearing for a defendant in an action wherein special bail is not required, shall file common bail for such defendant of the term of which he appears, and give notice thereof to the plaintiff or to his attorney. Att. Prac. 85. This is never done now, but the plaintiff's attorney searches.

An attorney shall not be compelled to appear or file common bail for any defendant in this court, unless such attorney hath by note in writing undertaken so to do, and such

note be produced by the plaintiff's attorney-

But if an attorney has accepted a warrant to appear for the defendant (which warrant cannot be revoked) or has subscribed the same, and does not file common bail accordingly, such attorney shall be compelled to file common bail of the proper term, and receive a declaration, and plead thereto; and in default of pleading, and a rule to plead having been first entered, judgment may be signed by default, for the neglect of the defendant or his attorney shall not work a prejudice to the plaintiff.

The form of the affidavit to entitle plaintiff to file Common Bail for the defendant, in case of his not doing it him-

felf within the eight days.

In the King's Bench [or Common Pleas as the case is]

A. B. against C. D.

J. S. of, &c. gentleman, maketh oath, that he, this deponent, did, on the day of at in the county of perfonally ferve the defendant C. D. with the writ or process hereunto annexed, by shewing him the said

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Of Common Bail or Appearance,

The appearance is in this manner:

Middlesex. Appearance for C. D. late of, &c. wheel-

E. F. (attorney's name)

No bail to be put in by any attorney for any party against whom no process is sued or original brought, but the party being present, and the assent of the court thereunto had. Hil. 14 Jac. 1. f. 4.



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Of

Of Common Bail or Appearance.

faid annexed writ or process; and at the same time delivering to him a true copy thereof, on which copy was an English notice in writing of the intent and meaning of such service, as by the * statute in that case made is required.

Sworn, &c.

7. S.

This affidavit may be made before any judge of the court, or commissioner authorized to take affidavits, or before the proper officer for entering the appearance, or his deputy, and filed gratis. Stat. 12 Geo. 1. 5 Geo. 2. &c.

But when the fuit is by original, appearance is entered in the philazer's book in the same manner as common appearances are entered in the court of Common Pleas, for which purpose you draw an appearance paper, or instructions for the philazer to enter in this manner:

Middlesex. Appearance for C. D. late of, &c. yeo-man, at the suit of A. B.

Nov. 1778. E. F. (attorney's name.)

The affidavit of service, when by original, is like the above affidavit, only specifying the writ, and where it was returnable.

Common Bail must be filed where judgment by confession, on pain of forseiting 10 s. to the box. Hil. 1 W. & M.

If the wife only be arrested on process against baron and seme, she shall be discharged on filing common bail for herself only. Att. Prac. 85.—but otherwise if both arrested. Ibid. 93. Sed quære. Baron and Feme were arrested for her debt dum sola, and the court discharged her; and said, the husband must lie till he puts in bail for both. Stra. 1272.

In an action on a replevin bond, common bail only. Tr. 10. W. 3.

Common Bail only from a bankrupt producing his certificate, allowed and confirmed.

^{* 12} Geo. 1. c. 30.

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Of Common Bail or Appearance.

The same in the Common Pleas. Prac. Reg. 65.—
but the marriage must be clearly made out. 2 Barnes 80.

If a desendant produces a duplicate of his discharge as a

If a defendant produces a duplicate of his discharge as a fugitive he shall be discharged on Common Bail only. 2 Barnes 81. 85. 88.

So on producing his certificate as a bankrupt. Ibid. 82.

But where defendant had undertaken to indemnify plaintiff from becoming bail for him in an action, and then became bankrupt; and being arrested by plaintiff, whose recognizance of bail had been forfeited after the bankruptcy, and against whom proceedings had been had so far as a fi. fa. against his goods, moved to be discharged on a common appearance

B. R:

Of Common Bail or Appearance.

Common Bail was ordered in an action of debt upon a judgment, there being special bail in the original action, and a writ of error brought upon the, judgment. Say. 43. 160. Wilf. 120. S. P.

Common Bail after a non-fuit for want of a declaration in a new action for the same cause. Tri. 13. W. & M. 1 R. Raym. 679.—but otherwise in 12 Mod. and Stra. 439. the court faying it was very unreasonable, as plaintiff suffered enough by paying costs in the first action, and therefore ought not to be in a worse condition than before.

Common Bail ordered, though the defendant was arrested on a note given by him after a former action was superseded.

Stra. 1218.

Common Bail only in an action of debt, upon a judgment, though upwards of 10 l. if the original cause of action was under 10 %. 4 Burr. 2117.

Common Bail only in an action upon a judgment of nonfuit, merely for cofts. Bufh v. Bates. Burr. 4. p. 2660.

In slander, Common Bail only, unless in slander of title, and then left to the difcretion of the court. Mich. 1654 .or unless spoken of a person of quality.

In trespass, assault, battery, conspiracy, false imprisonment, Common Bail only, unless on motion and order.

Mich. 1654.

C. D

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Of Common Eail or Appearance.

pearance, urging that he had delivered up all his effects, and that plaintiff ought to prove his debt, and come in as a creditor. The court held, that though by the statute 7 Geo. 1. c. 31. debts from bankrupts secured by promissory notes, and payable at a suture day, may be proved, and dividends received, deducting a rebate of interest and discount; and by 17 Geo. 2. c. 32. the obligees in bottomree and respondentia bonds, and the assured in policies are provided for; yet this case, wherein the cause of action did not accrue till after the bankruptcy, and where the money was to become due upon a contingency, is not within any of the statutes concerning bankrupts, and consequently plaintiff cannot be relieved under the commission. Desendant must be held to bail. Barnes 113. vide 2 Stra. 867. 1160. 2 Peer Williams 479.

The same in this court.

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Of Common Bail or Appearance.

In covenant, Common Bail only; unless ruled or ordered, or it be for non-ayment of money. Mich. 1654.

In an action on a bail bond, Common bail only. Mich. 8.

Anne. Or recognizance of bail.

Common Bail in actions on penal statutes. Yelv. 53. So in actions qui tam except on the 11 & 12 W. 3. for offences in exporting wool; but then the cause of action

ought to appear in the writ.

In actions against heirs, executors, or administrators, Common Bail only, unless in special cases, where it appears they have wasted the goods, and then they may be held to special bail by order. I Lev. 39. Carth. 264. I Mod. 16. Mich. 15. Car. 2. Reg. 2. but not on a bare suggestion of a devastavit only.

If a fecond writ is taken out pending the first, Common

Bail only. Stra. 1209.

Common Bail only in debt on a judgment, after the defendant has been superseded; it being the plaintiff's own laches not to detain him when he might, Stra. 1039.

If plaintiff sues here on a judgment recovered in a foreign court abroad, Common Bail only. Stra. 1243. Sed quare, if the original cause of action was for a debt, if he might not

hold him to special bail?

The defendant gave his note for 36 l. and was afterwards discharged on the insolvent debtors ast; and after that, meeting the plaintiff, he promised to pay the debt at two guineas per month, and paid twelve guineas accordingly; and being arrested for the residue, the court discharged him on Common Bail only, saying, it was no new consideration, but the old debt. Stra. 1233.

So where a bankrupt having obtained certificate, promifed a creditor who had not proved his debt under the commiffion, to pay him afterwards, and was arrested by him; the court discharged him on Common Bail only. 4 Burr. 736.

A. was indebted to B. in 100 l. for which B. arrested him, and an agreement was made, that B. should receive A.'s wages, and A. delivered up all his vouchers, and afterwards B. arrested him again, but the court discharged him on Common Bail.

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Of Common Bail or Appearance.

The fame.

The fame. Barnes 107.

In account Common Bail only, till judgment, quod computet secus in debt on account. 2 Roll. Rep. 53.

Common appearance ordered where defendant had been arrested for money won at play. 2 Wilf. 67.

The same.

The fame.

The fame,

The fame: But vide post in what cases a defendant may be held to bail in a second action pending the first.

The fame.

The same.
On a writ of error after judgment by default, Common Bail only. Prac. Reg. 195. But of bail in error, see post, title error. 2 vol.

All error in messe process is cured by appearance, because the only intent of messe process is to bring the desendant into court, and when he is come in, that is out of the case.

Of

Df Special Bail.

Of the Affidavit to hold to Bail.

In all cases where the plaintiff is authorized and would compel the defendant to give Special Bail, and does not mean to proceed to outlawry, he makes an affidavit of the cause of his action, in order that the "ac etiam" clause may be inserted in his writ, that the sheriss may arrest and hold the desendant to bail, which is called bail below; and by that means also he may compel the desendant to put in bail to his action, which is called putting in bail above; or in case of his resusal or neglect so to do, the plaintiss may proceed against the sheriss, as will be shewn hereafter.

This affidavit, in order to hold to Special Bail, may be made before any judge of the court, or commissioner of such court in the country *, or before the officer who issues the writ, or his deputy; for which affidavit 1 s. only is to be paid above the stamp duties, and then filed with such officer or his deputy. For if it is not filed before or at the time of suing out the writ, the court will discharge the party from the

arrest on filing common bail only. 2 Wilf. 225.

The stat. 12 Geo. 1. c. 29. requires the cause of action to be above 10 l. to hold to Special Bail; and both the statute and established rules of the courts require a positive oath to be made of the debt.

The form of an affidavit to hold to bail:

A. B. of, &c. the plaintiff in this cause, maketh oath, that the desendant C. D. is justly and truly indebted to this desendant, in the sum of forty pounds for goods sold and delivered, (or whatever the cause of action is) by this deponent to the said C. D.

Sworn the before, &c:

day of

A. B.

^{*} Even though such commissioner is concerned as atterney for the plaintist. East. 15. Geo. 2. but in the Common Pleas such affidavits made before commissioners concerned as attornies have been deemed insufficient. 2 Barnes 37.

Of the Affidavit to hold to Bail.

An affidavit was made to hold the defendant to bail. It had but one flamp, and joined together an action of debt on bond for 800 l. and an affumpfit for 150 l. and on objection that debt and affumpfit could not be joined in the fame affidavit; and moreover that it was a fraud on the flamp duty; the court discharged the desendant on common bail in both actions, for the impropriety of joining them in the same affidavit: But they did not lay much stress upon the objection of its being a fraud on the stamp duty. Burr. 4. p. 2690.

Affidavit by a third person, that defendant was indebted to plaintiff in 500 l. as appears by a stated account attested by the consul at Oporto, objected to as insufficient; but the defect being supplied by a subsequent affidavit of defendant's acknowledging the stated account, the rule to shew cause why a common appearance, was discharged.

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An affidavit was made by a merchant in London, that the defendant owed the plaintiff 2701. as appears by an affidavit made by the plaintiff in Amsterdam, which the deponent believed to be true; but the court faid, that there could be common bail only, for the oath abroad could be no ground for process here, and then there was nothing but the belief of a third person, which is not sufficient. Stra. 1209.

So an affidavit, that the defendant borrowed of the plaintiff 2000 l. on bottomree, which money is now due and owing to this deponent by virtue of the faid bond as thereby may appear, was held insufficient, upon an objection made that this was no oath of the debt; for suppose every penny was paid, and a separate receipt taken for it, yet, upon the face of the bond, the whole would appear due. Stra.

So an affidavit, that the defendant accepted a foreign bill of exchange but had refused payment, &c. deemed insufficient to hold to special bail; tho' the affidavit was positive that the defendant had accepted the bill, because it was only sworn that the defendant was indebted as appeared by the said bill.

1 Will. 279.

So an affidavit by a third person, that the desendant was indebted to plaintiff in 800 l. as appeared by an account stated under the desendant's own hand, held insufficient, as the plaintiff might have been paid the debt, and the account discharged for any thing the deponent knew. 1 Will. 121.

So an affidavit made by the plaintiff's book-keeper, that the defendant was indebted to the plaintiff in 3400%. for money

Of the Affidavit to hold to Bail.

money had and received by the defendant to the use of the plaintiff, as the deponent really believed, held insufficient. Stra. 1226.

Swearing only to belief, tho' with a reference to accounts fent from abroad, where the debt arose, is not sufficient.

4 Burr. 655.

But an affidavit that the defendant was indebted to the plaintiff in, &c. as he computes it, was thought sufficient by

the only two judges in court. 4 Burr. 1032.

An affidavit was made by the plaintiff on his going beyond sea, 4 July 1744, that the desendant was indebted to him in 2771. for goods sold and delivered; and on this affidavit process was taken out 9 May 1747, and marked for bail. But the court ordered common bail only, for tho' he owed so much in 1744, he might not owe it in 1747; and the act requires oath of a subsisting debt at the time of suing

out the process, Stra. 1270.

Plaintiff made affidavit, that defendants [viz. baron and feme] or one of them, was indebted for board, &c. provided for the wife; the defendant husband moved for a common appearance. The court held, that if an infant marries a woman of full age, he is liable to pay her debts, but thought plaintiff's affidavit not sufficiently certain. On which plaintiff ascertaining what was due before and what after marriage, &c. the sum for which bail was to be given was moderated at a judge's chambers. Barnes 95.

The plaintiff made oath of his debt before a burgo-master in Holland, who certified an account to the plaintiff's agent here, who made an affidavit that he believed the said oath and account current to be true, and thereupon sued out a writ and held the desendant to bail; but the court discharged

the defendant on common bail. 1 Wilf. 231.

But where an affignee of a bond swore that the obligor was indebted in 90 l. for principal and interest, as he believed, the court held it sufficient to hold to special bail. Trin. 16

Geo. 2. Loveland v. Baffet.

An affidavit that the defendant is indebted to plaintiff in 1031. for goods which the defendant converted to his own use, is sufficient to hold a custom-house officer to bail in traver. I Wilf. 335.

If an executor swears to the books of the testator, and that he believes them to contain a true account, and that the debt is still unpaid, it is sufficient to hold to special bail.

But an affidavit by an executrin, that the defendant was indebted to her testator (so much) as appears by the books

Of the Affidavit to hold to Bail.

of her testator, was held insufficient, and common bail ordered.

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An affidavit made by an administrator that the defendant is indebted in 40 l. as deponent believes, and as appears by note; the judge in the Gommon Pleas, who had ordered a common appearance, was to be reattended. Barnes 70.

The court held, that to hold to bail in actions on bonds to fave harmless, &c. as well as in actions of covenant, the plaintiff must swear positively, and certainly how, and for how much he is damnified: For the court cannot take it by implication. Barnes 109.

An affidavit that the defendants were indebted jointly, not sufficient to hold them to bail feverally. 2 Barnes 58.

An affidavit that the defendant was indebted to him in fuch a sum, as appears by agreement bearing date such a day, held insufficient. 4 Burr. 1447.

In cales of bankrupicy the courts require the affidavit of the debt to be as positive as in other cases, unless it appears that the bankrupt resuses to make the same. 2 Barnes 65. 2 Barnard K. B. 284.

If the affidavit by the affignees only refers to the bankrupt's books, without adding that they believe the same to be true, it is not sufficient to hold to bail. Fludyer assignee of Jackson v. Hughes. 27 Geo. 2.

Or if the affidavit is only that the defendant is indebted as appears by the bankrupt's book, not sufficient. Stra. 1219.

But if the affignees swear that the defendant is indebted, as appears to the deponents by the last examination of the bankrupt, and as the deponents verily believe, and that they have not received the debt, or any part of it, and that they believe it to be still due, such affidavit is sufficient for Special Bail. 4 Burr. 1992.

An affidavit made by one convicted of sclony, not sufficient to hold to bail. Barnes 78.

Affidavit made by a pickpocket returned from transportation, not sufficient. Barnes 79.

But an affidavit made by one convicted of perjury was held sufficient: For the plaintiff cannot be a witness, yet he must not be stripped of his legal remedy to recover his just debts. Barnes 116.

From hence it appears, that affidavits couched in terms of reference only, have always been held insufficient, as such affidavits are not according to the statute which requires a positive oath of a subsisting debt, in order to hold the party to Special Bail.

Of the Supplemental Affidavit to hold to Bail.

HEN a plaintiff has once sworn positively to his debt, in order to hold the defendant to Special Bail, the court of King's Bench will never receive any affidavit whatever either to explain or contradict the plaintiff's oath; even an affidavit of the plaintiff's confession that the defendant owes him nothing will not be received. 1 Wilf. 335.

But the practice in the Common Pleas somewhat differs in this particular from the practice of the court of King's Bench, and admits of Supplemental and even contradictory affidavits; for they hold, that notwithstanding the plaintiff makes a positive affidavit of his debt, yet the matter of bail

is examinable by the court.

The plaintiff made an affidavit of his debt in order to hold to bail; but the defendant making an affidavit that he believed the whole debt would appear to be paid, a common appear-

ance was allowed by the court. Barnes 66.

An affidavit made by a third person, that the defendant was indebted as appears by a flated account was held infufficient; but made good by another affidavit, that the defendant owned the account. 2 Barnes 81.

So in case of a bond, a supplemental affidavit was admitted, "that the money appears to be due, and that the defendant owned the debt a year and an half ago. Barnes 84,

Affidavit that the defendant was indebted if the ship Suffex was not unavoidably loft, prima facie sufficient; but affidavits read on both fides controverting the fact. 2 Barnes 58.

In what cases required.

HERE the debt is 101. or above, and affidavit made thereof, Special Bail must be put in. Stat. 12 Geo. 1. In an action by the loser against the winner at play, tho' the action founded on the stat. 9 Ann. c. 14. because it is a remedial law, and at the suit of the party grieved; and wherein the desendant is a debtor to the plaintiff in so much had and received to his use. Stra. 1079.

In an action on the 11 & 12 W. 3. for offences in exporting wool; but then the cause of action must appear in the writ.

In an action on 26 Geo. 2. c. 21. for having unsealed wrought filks in his custody; the 8th seal. expressly requiring Special Bail. — And if the plaintiff makes affidavit, it need not be positive in this case, as the act does not require an affidavit at all. 4 Burr. 1569.

In debt on a judgment, if the debt or damages without costs originally amounted to above 101. East. 5 Geo. 2.

In an action for mesne profits after a recovery in ejectment, special or common bail is in the discretion of the court. Barnes 85.

In trover defendant may be held to Special Bail. Cro. Jac. 667. 6 Mod. 14. 2 Stra. 1192. Ld. Ray. 767. 1 Wilf, 23. And it was held that upon a proper affidavit, the writ may be marked for bail without order of the court, or a judge at chambers, for it is more an action of property than a tort:

In an action for double rent, special bail is required by 4 Geo. 2. c. 28.

In feandalum magnatum, special bail on motion. Earl of Stamford v. Gordal. T. Raym. 74. 2 Mod. 215. I. Brownl. 90. 1 Sid. 183.

See ante, under title common bail or appearance, in what cases a plaintiff may have Special Bail upon motion and order.

There can be no bail for mere damages without motion or

order, because mere damages are uncertain.

Plaintiff's testator had executed a letter of licence to defendant for five years which were not expired; defendant was arrested and held to bail at plaintiff's suit; on which he moved to be discharged on entering a common appearance; but the court denied the motion, being of opinion, that entering into the question about the letter of licence (which could not amount to more than a release) was entering into the merits of the cause. Birch Exer. v. Douglas. Barnes 63.

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In what cases required.

An affidavit of an affault in order to procure a judge's order for holding the defendant to bail.

> A. B. of C. in the county of D. clerk, maketh the day of oath, that on last past, he this deponent going to view whether the tythe hay on the land of E. F. of C. aforesaid, were ready to be set forth, he the faid E. F. did then in the faid field, without any reasonable cause, in a violent manner assault, beat and throw this deponent on the ground. this deponent making no opposition or resistance against the said E.; but this deponent being rescued by some persons present from the said E. the faid E. did again, as foon as he got loofe from the persons who rescued this deponent, a fecond time affault, throw down, beat and kick this deponent about the head and body fo that the blood gushed out at this deponent's ears; which occasioned to this deponent the loss of his speech and hearing for some time, so as to render him incapable of performing his duty in the aforefaid parish, he being minister of the fame; and this deponent further faith, that the faid E. hath often declared, that it was no fin for any man to kill or destroy this deponent.

> > Sworn, &c.

A. B.

If special bail is put in where it is not required, it does not bind the court from ordering common bail. Stra. 1077.

In all causes of removal from inferiour courts, Special Bail is required. Mich. 1654. except the defendant be an heir, executor, or administrator; or the action be for words or small trespasses. Hil. 2. Jac. 2.

And note, that an heir, executor, or administrator, shall not put in bail above, the they have done it in the inferior court according to the custom of such inferior court. I Lev. 268. 2 Lev. 204. But of bail upon removal, see babeas corpus, Vol. 2. Also of bail in error, see title error,

If two persons are jointly and severally indebted in a sum above 10 l. tho' under 20 l. each may be held to bail for the whole, — sed quære? for Gould justice of C. B. before whom the affidavit was sworn, said, they could only hold one to bail.

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In what cases required.

If there were two separate affidavits made, in such case it seems, that each might be held to bail for the whole; but if one affidavit, then one only of the desendants can be held to bail.

After a non-pros in the first action, the defendant may be held to bail in a second action for the same cause. Stra. 430.

A plaintiff having misconceived his action, discontinued and arrested desendant again for the same cause; and the court resused to discharge him on common bail, because it was a mistake only, and not done to oppress. — The case was this, the plaintiff had arrested desendant in an action on the case, on a special agreement signed and sealed, but not stamped; and when the cause was at issue, the plaintiff's attorney found out that he had made a mistake in declaring in case, the writing being made in Ireland where no stamps are necessary; and that he ought to have declared in covenant, therefore discontinued and arrested the desendant again. 2 Will. 381.

A defendant might have pleaded bankruptcy in the first action, but did not, and there was a verdict and judgment against him; and an action was brought against him upon the judgment, and then he moved to be discharged on common bail; because the bond, which was the foundation of the demand, was before bankruptcy; but the court said, we can look no farther back than the judgment, and there-

fore there must be bail. Stra. 477.

In an action on a judgment of an inferior court special

bail must be put in. 2 Barnes 71.

A defendant ordered to be held to bail for mesne prosits after a recovery in ejectment. Prac. Reg. 62. the recognizance in such case is usually taken to two years value, tho

that is entirely discretionary.

If an action is brought against husband and wise, and the wise only be arrested, she shall be discharged on a common appearance, for otherwise the husband might contrive the imprisonment of his wise: But if both are arrested, she shall not be discharged until bail put in for both, for otherwise a woman might marry a man in gaol, and defraud her creditors. Barnes 59. 2 Barnes 80. 6 Mod. 17. 105. 7 Mod. 10, 63. Lev. 1, 216. 2 Barnes 74. Sid. 295. pl. 2. 2 Keb. 442. pl. 4. Sed vide 10 Mod. 162. Rep. & Case of Prast. C. P. 117.

If husband and wife are arrested for her debt dum fola, she shall be discharged, and he lie till he puts in bail for both.

Stra. 1272. Vol. I.

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Where a Defendant may be held to Special Bail in a fecond Action for the same Cause pending the first.

THOUGH it is the rule and practice of both courts, that a defendant arrested upon a second writ sued out pending the first, shall be discharged on common bail; yet cases may arise where the court will not hold strictly to this rule.

In debt on bond for 900 l. defendant put in bail, who justified and were allowed, — the plaintiff finding they were foresworn, and worth nothing, discontinued; but before he had done so, he arrested the defendant in a second action and held him to bail. — Upon which the defendant moved to be discharged on Common Bail, according to the above general rule, and obtained a rule to shew cause. — But on shewing cause, a scene of villainy appearing to the court, they discharged the rule, and said, that the plaintist was right in laying hold of him as he did; for had he discontinued before, the defendant probably would have absconded, and therefore ordered him to be held to Special

Bail. Olmius v. Delany. Stra. 1216.

But where bail had justified in an action for 23341. and the plaintiff not liking them, obtained a fide bar rule for leave to discontinue on payment of costs, not disclosing that bail had justified in the action which he prayed leave to difcontinue; and then brought a new action on the same bonds, laid the venue in Middlesex instead of London, made a fresh affidavit of the debt, carried the same with the declaration to the clerk of the rules, and infifted upon his marking the debt fworn to thereon, in order to charge the defendant in custody of the marshal with this new declaration. scheme being to detain the defendant till next term, as this being the last day of term, he would not be able to justify bail in this new action till next term. On disclosing of the matter by the clerk of the rules, the court fent for the attorney, whose counsel cited the above case of Olmius and Delany; and faid, that as the bail were infufficient, this was the likeliest method of securing the payment of a just debt: The court at first hesitated what to do, but held it to be a trick and an unwarrantable conduct in the attorney, and that it should not have the intended effect, for he ought to have asked leave of the court to charge the defendant in custody, disclosing the whole of the case to them, and at first thought of making a rule to snew cause why the plainWhere Defendant may be held to Special Bail in a fecond Action for the same Cause pending the first.

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tiff should not be at liberty to do so. But at length, they discharged the side bar rule which gave the plaintiff leave to discontinue. So that the bail to the former action (who had justified) still remained liable to their recognizance. Bekhier v. Gansell. Burr. 4 pt. 2052.

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Where

Where a Defendant cannot be held to Special Bail, the the Debt is 10 l. and upwards.

BY the 11 & 12 W. 3. c. 9. Sheriffs, & c. are not to take Special Bail in Wales, or Counties Palatine, upon a writ or process out of any of his Majesty's courts at Westminster, unless an affidavit be first made and filed in court, signifying the cause of action, and that the same amounts to 201. or upwards; and bail is not to be taken for more than

the fum expressed in such affidavit.

Special Bail was taken for 12 l. upon process into Lancashire; and on motion for Common Bail, it was insisted, that the act 12 Geo. 1. c. 29. about not holding to bail under 10 l. having only an exception of Scotland, was intended to extend to all other places, and consequently was a virtual repeal of 11 & 12 W. 3. c. 9.—Sed per cur. They are not inconsistent, for the 12 Geo. 1. does not say that you shall have bail for 10 l. but only that you shall not have bail under 10 l. Whereas, in the 11 & 12 W. 3. there are negative words, and the oath in this case being only to 12 l. the plaintiff is not entitled to Special Bail, and the rule for common bail must be absolute. Stra. 1102.

By the acts 1 Geo. 2. flat. 2. c. 14. f. 15. & 16. and 31 Geo. 2. c. 10. for encouraging seamen to enter into his Majesty's service. — No person who shall list himself to serve on board any of his Majesty's ships of war, shall be held to bail, but on affidavit that the sum justly due amounts to 201.

A seaman who remains in the ship's book, though he has absented himself, is a seaman within the act. Barnes 95.

Armourers, gunners, &c. being enlisted as common

feamen, are within the acts. Barnes 114.

By the mutiny acts, foldiers are not liable to be arrested on any process or execution, unless the original sum or cause of action amounts to 10%. over and above all costs. Affidavit thereof to be made before a judge or commissioner.

A gunner in the train of artillery, is the same as a com-

mon soldier, and common bail is sufficient. Stra. 7.

So a person that is qualifying himself as a trooper, learning to ride, tho' but just enlisted, shall be taken to be doing his duty and discharged on common bail. Stra. 7.—So recruits just enlisted.

But an out-pensioner of Chelsea Hospital is not considered

as a foldier. Barnes 432.

The original debt was under 10 l. plaintiff recovered and brought debt on the judgment and held defendant to bail: whereupon he moved to be discharged on a common appearance.

Where a Defendant cannot be held to Special Bail tho' the Debt is 10 l. and upwards.

pearance. But the court faid the debt which they were to consider was the sum recovered by the judgment, and that

the defendant cannot be held to bail. Barnes 432.

By the 29 Geo. 2. c. 4. f. 14. an act for the better recruiting of his Majesty's army, it is enacted, that no perfon enlisted according to it, shall be taken out of his Majesty's service by any process, other than for some criminal matter. — But it has been held, that such a person may be surrendered by his bail, in their own discharge. 4 Burr. 339.

And by the 30 Geo. 2. c. 8. Persons enlisted according to that act, and compelled against their wills, are privileged from arrests, except for some criminal matter; but a person voluntarily enlisting himself has been held not to be pri-

vileged. 4 Burr. 466.

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And by the 7 Anne. c. 12. All processes whereby the perfon of any ambassador, or other publick minister of any soreign prince or state authorized and received as such, or the domestick or domestick servant of any such ambassador, or other publick minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and word to all intents, constructions and purposes whatsoever. It has been adjudged, that one claiming protection under this act as a domestick servant to a foreign minister, must really and bona side be a servant of such ambassador, and serve him in that capacity. 3 Wils. 33.

But altho' the clause says "domestick servant", it has been determined, that the privilege does not only extend to a servant living in the house, for many houses are not large enough to contain and lodge all the servants of some ambassadors; but to a real and actual servant of an ambassador tho

he lodge out of the house.

Before whom to be put in in Town.

IF the action is by original in this court, the philazer must be called upon to attend a judge thereof, with his book, and if the bail are ready he will take the recognizance; but it is most usual for the defendant's attorney to make a note for his instructions, specifying the county, the plaintiff and defendant's names, the names and additions of the bail, and the sum sworn to—for putting in bail is paid 16 s. 6 d.

If the defendant was arrested on a Testaum capias, his attorney must take particular care, that bail is entered and filed with the philazer of that county wherein the action was first laid, or into which a former writ is recited to have issued, and not with the philazer of that county wherein the defendant was arrested; for otherwise the bail-band may be assigned, and it is not to be presumed or supposed that the plaintiff's attorney will search with a wrong philazer,

The same in this court |.

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Before whom to be put in in Town.

O in this court the philazer or other officer who issued out the writ, is to attend with the attorney and bail before one of the judges thereof, who takes the recognizance, and the philazer makes an entry of it in his book, which entry he will afterwards draw up in a proper form, if there should be occasion to sue the bail upon their recognizance. The expence is somewhat more here.

The defendant's attorney must take care that he goes to the proper philazer or officer, in whose office the bail ought to be entered; for should bail be entered in a wrong office, by rule of court made in Trin. 1. W. & M. the plaintist may proceed on the bail-bond, and the defendant, before he shall be admitted to plead, must pay full costs to the plaintist.

The same caution must be observed in this court.

In case the proper philazer or officer cannot attend, the recognizance may be taken without him on a piece of parchment in the following form, stampt with a double twelve-penny stamp.

London, Capias against C. D. late of London, Carpenter, at the fuit of A. B. for 100 l. upon promises, returnable on the morrow of the Holy Trinity.

Affidavit for 50 1.

Bail E. F. of Charing-Cross in the Parish of St. Martin's in the Fields, in the liberty of Westminster, in the county of Middlesex, batter.

G. H. of the fame place, cilman.

The defendant bound in 100 l. Each of the bail in 50 l.

Taken and acknowledged,

the day of

&c. before L. M. atty, for oefendant.

Fa

Before whom to be put in in Town.

If the fuit is by bill in this court, the bail-piece is engroffed on a double shilling stamped piece of parchment in this shape.

> Michaelmas term in the 19th year of King George the third.

London, (to wit) C. D. is delivered to Bail upon a Cepi corpus.

To E. F. of Cheapside, London, mercer.

G. H. of Cateaton Street, London, grocer.

E. M. attorney.

At the fuit of A. B.

The bail-piece must be taken to a judge's chambers with the bail, upon which the clerk takes the acknowledgment, which is expressed to the bail as follows:

YOU do jointly and severally undertake, that if the desendant C. D. shall be condemned in this action at the suit of the plaintist A. B. he shall satisfy the costs and condemnation, or render himself into the custody of the Marshall of the Marshal-sea of the court, or you will pay the costs and condemnation for him.

If the bail is put in, in term time, 4 s. is paid—2 s. 6 d. to the master of the office—1 s. to the judge's clerk, and 6 d. to the Porter.—If in vacation, the judge's clerk takes 2 s.

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Before whom to be put in in Town.

If the defendant is not present, and does not enter into the recognizance, then the bail are bound in double the sum the cause of action is sworn to amount to.

The condition of the recognizance.

YOU (naming the defendant if present) do acknowledge to owe unto the plaintiff 100 l. you (naming the bail) do severally acknowledge to owe unto the plaintiff the sum of 50 l. apiece, to be levied upon your several goods and chattels, lands and tenements, upon condition, that if the desendant be condemned in the said action, he shall pay the condemnation money, or render himself a prisoner to the Fleet for the same; and if he sail so to do, you (naming the bail) do undertake to do it for him.

In this Court the bail are bound in a fum certain—but in the King's Bench, when the proceedings are by bill, the bail are not bound in a certain fum to the plaintiff, but only undertake that the defendant shall pay the condemnation money, or render his body to prison, and the recognizance being general must be reduced by the judgment to a certainty; but they are not liable to a larger amount than is sworn to, and indorsed on the writ. Vide Salk. 402.

Before whom to be put in in Town.

When bail is put in, notice must be given thereof in writing to the plaintiff's attorney in this manner:

In the King's Bench,

Between \{ A. B. plaintiff, and C. D. defendant.

Take notice, that bail was this day put in for the abovenamed defendant, before the Honourable Mr. Justice Buller, at his chambers in Serjeant's Inn, Chancery Lane, London; and the names of the bail are B. F. of Cheapside, mercer; and G.H. of Cateaton Street, London, grocer. Dated, &c.

Yours, &c.

E. M. Defendant's attorney.

To Mr. O. P. plaintiff's attorney.

If the fuit is by original, fay, "That bail, above was this day put in for the above-named defendant, with the philipper, before, &c.

Before whom to be put in in Town.

Upon putting in bail here also, notice thereof must be given in writing to the plaintiff's attorney as follows;

A. B. Plaintiff
against
C. D. Defendant.

SIR,

Take notice that E. F. of Charing Cross in the parish of St. Martin's in the Fields, in the liberty of Westminster in the county of Middlesex, hatter, and G. H. of the same place, oilman, were this day put in as bail for the desendant in this cause.

Your humble fervant,

L. M. atty. for the defendant,

TeMr. O. P. atty. for the plaintiff,

Before whom to be put in, in the Country, in what manner, and when to be transmitted.

BY the statute 4 & 5 W. & M. c. 4. The judges of the superior courts at Westminster are impowered to appoint commissioners in any of the counties of England, to take recognizances of bail in causes commenced in the superior courts.

The method of putting in bail to a fuit commenced by bill in the King's Bench, before a commissioner in the country, is exactly the same as when a suit is commenced by original, and the like method is observed upon process from both the courts.

The attorney takes the bail-piece properly engrossed to the commissioner who takes the recognizance; of which caption, the following affidavit must be made:

In the King's Bench. Between { A. B. plaintiff, and C. D. defendant.

R. S. of, &c. gent. maketh oath that the recognizance of bail hereunto annexed was duly acknowledged by E. E. and G. H. the bail therein named, in this deponent's prefence before eq. the commissioner who took the same.

Sworn, &c. R. S.

Bail taken before a commissioner in the country upon pro-

cess from B. R. is to be put in within 6 days.

On process from C. B. it must be so taken that it may be allowed by a judge conditionally, and filed with the Filazer within eight days after the Quarto die post of the return of the writ.

The recognizance of the bail so taken before the commisfioner with affidavit of the caption thereof, must be transmitted to the Lord Chief Justice, or one of the judges of the court, and within the following times, in the respective courts.

In the King's Bench.

In the Common Pleas.

If taken within 40 miles of London or Westminster, to be transmitted within, 8 days after the taking thereof.

If taken within 40 miles of London or Westminster, to be transmitted within 10 days.

^{*} Except as to the condition of the recognizance when the same distinction is mentioned in preceding page, is kept between a furt by bill and original in that particular.

Before whom to be put in, in the County in what manner, and when to be transmitted.

15 days, unless all the judges 20 days, &c. Pas. 5 W. & M. be on the circuits, and then as foon as any one is returned to his chambers. Mich. 8 W. 3.

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If above 40 miles within If above 40 miles within

Notice of putting in bail before a commissioner must be given in four days after the caption, exclusive in B. R. of the return day; and if last day be Sunday, then the whole Loft 190. - In C. B. the fame. Mich. 13 Manday.

When the bail is transmitted to the judge, notice thereof must be given to the plaintiff's attorney in the following manner:

In the King's Bench. Between \{ A. B. plaintiff, and C. D. defendant.

Mr.

Take notice, that the recognizance of bail, acknowledged and transmitted in this cause, was this day left with Mr. justice at his chambers in Serjeant's Inn, Chancery Lane, London, for his allowance; and the names of If the fuit is by the bail, &c. as before, original in B. R. say, " was this day filed with the filazer; and the names of the bail are, &c."

By rules in both courts, every commissioner is to have a book kept purposely for entering the names of the defendant and his bail, and of the plaintiff, as in the bail-piece, and the time of taking thereof; and the name of him by whom fuch bail shall be transmitted, and also the name of the attorney for the defendant; that the plaintiff's attorney may refort thereto for information.

By the same stat. of King William, judges of assize in their circuits are empowered to take recognizances of bail, which shall be transmitted and received as aforesaid, with-

Bails taken before commissioners, and transmitted to and allowed by a judge, shall be delivered to the clerk of the judge, who shall allow the said bail; which clerk shall take the fees due to the proper officer for the duty thereof, and forthwith deliver the same to be filed.

When to be put in, and if taken, when filed,

IN London and Middlesex, Special bail is to be put in; in 4 days, exclusive of the day of the return after the return of the writ.

In any other county within 6 days, exclusive.

And if the last of the 4 or 6 days be Sunday, then on the next day. Mich. 8 Anne. Prast. Reg. B. R. 89. Stra. 782. 914.

If bail are accepted they ought to be filed within 20 days. Trin. 13 Car. 2. But plaintiff's attorney for expedition may file it sooner. After 23 days it becomes absolute, and the desendant's attorney takes it away and files it. Comb. 262.

Bail taken before the continuance day is to be filed of the preceding term,—if after, of the subsequent term. East. 5 Geo. 2. Reg. 1.

Special bail put in after an arrest, and before the return of the writ, is well. Kindley and another v. Cunningham. East. 8 Geo. 3.

Every bail put in before a judge of the court, which is accepted by the plaintiff, ought to be filed within 20 days after it is so accepted, by the attorney who put it in. Trin. 13 Car. 2.

Every bail taken before or upon the continuance day, is a bail, and to be filed of the preceding term; and every bail taken after the continuance day, is a bail, and to be filed of the subsequent term, and not otherwise: But where new bail is added to other bail, taken on or before the continuance day; in such case the new bail shall be taken and filed as of that term in which the bail was first put in.

When bail is accepted, the bail-piece must be filed with the figner of the writs, in B. R. when it is not by original, for which is paid 4d.—In C. B. with the Philazer.

When to be put in, and if taken, when filed.

I N London and Middlefex, Special bail is to be put in in 4 days of the appearance day of the return of the writ.

In any other county within 8 days; it is the practice in almost all cases to reckon the days inclusive, whereas in the King's Bench they are usually reckoned exclusive. So that it happens from the difference of reckoning, that in short terms, it may be a means of gaining a term, and thereby a suitor in this court, in some instances, may find an advantage which in the other he cannot.

The same in this court; but if put in before the arrest, it is not regular without consent. Pract. Reg. 51. Barnes 83.

After the transmission of the bail-piece, it shall be forthwith filed by the proper officer to be entered upon record, otherwise it shall be as no bail, and the plaintiss to be at liberty to proceed on the bail-bond as if no such bail had been put in; and the defendant, in case he be admissible to plead to the original action, shall not be admitted so to de, unless he sirft pay the sull costs to the plaintist for the profecution on the bail-bond, and plead as of the time when the bail should have been duly entred. Hil. 6 Geo. 1.

And no such bail shall be received or filed, unless transmitted within the respective times appointed by the said

rule without leave of the court. Mich. 6 Geo. 2.

If the bail be not filed within the times above directed, application must be made to the court; the judges in the treasury will not give leave to file it, the rule saying it shall not be filed without leave of the court.

Of excepting to bail, and who cannot become Bail.

If the plaintiff thinks the bail insufficient, he may except to them, and thereby oblige them to appear and justify in court; by swearing themselves house-keepers, and worth double the sum for which the defendant is arrested, after all their own debts are discharged.

If bail is put in before a judge, exception must be in 20 days after notice given of putting in bail. Mich. 16

Car. 2.

If bail is put in before a commissioner in the country, exception must be within 20 days after transmission and notice taken thereof. Tri. 4 W. & M.

When the fuit is by original in this court, the exception to bail must be entered in the philazer's book; but when it is by bill, in the Judge's book.

Notice of exception must be given in writing to the defendant's attorney. East. 5 Geo. 2. in the book thus:

I except to this bail.

L. M. Plaintiff's attorney. I Decem. 1776.

The notice is in the following manner!

King's Bench.

A. B. against C. D.

I have excepted to the bail put in for the above named defendant, Yours, &c.

To Mr. S. F. Defendant's attorney. L. M. Plaintiff's attorney.
1 Decem. 1776.

After an affignment of a bail-bond, if the bail below offer to become bail above, you cannot except to them. Pyke v. Puidlebury. Mich. 1742. 1 Will. 223.

Bail below, may become bail above without the defend-

ant's consent. Stra. 876.

Bail cannot be excepted to after declaration delivered, unless it be delivered De bene esse. Attor. Pract. B. R. 93.

for by declaring you admit the bail to be sufficient.

If no exception be taken to bail, and entered in the judge's book within the 20 days after the notice, then upon oath thereof (for which no fee is to be taken); such bail shall within 4 days next after be filed by the attorney for the defendant. Mich. 16 Car. 2. Mich. 8 Anne.

Of excepting to Bail, and who cannot become Bail.

THE fame in this court.

The same; and the exception must be marked on the bail piece, or in the philazer's book, or they will become absolute in 20 days, notwithstanding the plaintiff has given notice of exception within 20 days.

The same in this court. East. 5 W. & M.

In London and Middlefer, exception is made in the philazer's, book in other counties under the bail-piece filed at the philazer's of the county.

The like notice must be given here, and must be entered in the Philazer's book or bail-piece. 2 Barnes 61. 83. Pract. Reg. 77.

The fame.

In this court, you may except to them. Mich. 6 Gec. 2. 2 Barnes 63.

The same in this court. 2 Barnes 66.

If special bail be excepted to, the defendant shall perfect his bail within 4 days after exception taken; and in default thereof the plaintiff may proceed on the bail-bond. Trin. 3 & 4 Geo. 2.

Of excepting to Bail, and who cannot become Bail.

An exception entered after the expiration of the faid 20

days, shall be of no validity. Mich. 8 Anne.

If the same persons that are bail to the sheriff become bail above, and plaintiff thinks them insufficient, and would have them justify; he must enter his exception, and give notice thereof, that the defendant may justify if he thinks sit; but if he neglects so to do, the plaintiff cannot take an affignment of the bail-bond, having the bail therein as sureties also on the bail-piece, but must proceed by ruling the sheriff, who is answerable for taking insufficient bail.

If one person be excepted to as bail and another be added, the name of the former may, with leave of the court, be struck out of the bail-piece at any time before sci. fa. Say. Rep. 58. And proceedings as to him may be

stayed after sci. fa. brought. ibid. 309.

No attorney of this or any other court shall be bail in any action or suit depending in this court. Mich. 1654.

Mich. 14 Geo. 2.

No bailiff, sheriff's officer, or other person concerned in the execution of process, shall be permitted to be bail in any action or suit depending in this court. Mich. 14 Geo. 2. Stra. 890. Barnard K. B. 417.

Persons outlawed after judgment cannot be bail.

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Of excepting to Bail, and who cannot become Bail.

For plaintiff is not bound to except to additional bail; but defendant must compleat his bail without it. Pract. Reg. 81.

No attorney of this or any other court, or any person practifing as such, shall be bail in any suit or action de-pending in this court. Mich. 6 Geo. 2.

No sheriff's officer, bailiff, or other person concerned in the execution of process, shall be permitted or suffered to become bail in any action or fuit depending in this court. Mich. 6 Geo. 2. And this rule has been held to extend to marshal court officers, and all officers, executing the process of this or other courts.

F 2

IF notice of exception is given in term, bail must justify in 4 days after such notice, or desendant must add other bail who must justify within the said 4 days—

But if exception and notice thereof be in vacation, the bail put in, or additional bail must justify on the first day of next term. East. 5 Geo. 2.

Two days notice of justification must be given exclusive of the day it is given; and if Sunday intervenes 3 days notice; — but now, it is said that if one day intervenes between the day of giving notice and the day of justifying, it is sufficient.

If the same bail justify who were before put in and excepted to, notice the night before their justification is sufficient: Hil. 15 Geo. 3. Wright v. Ley.

Bail cannot be justified before a judge at his chambers, except by consent; but must be justified in court upon notice given thereof, and affidavit made of such notice.

If notice of exception be given in the vacation, or so late in term that the defendant has not four days for such justification, he must justify on the first day of next term.

In a country cause it is often impossible to justify, &c. within the four days, therefore it is usual to send up an affidavit of justification along with the bail-piece; but if that is not done, application must be made for time to justify,

Bail not present at the sitting of the court, must wait till the rising. Loft. 88.

The fame in this court.

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Of justifying, adding, and perfecting Bail.

THE fame. Tr. 3 5 4 Geo. 2.

The fame. Tr. 8 Geo. 3.

The same. Barnes 82. and the court will not indulge the defendant with any farther time, it being an artifice to defeat the rule for obliging defendant to perfect bail in four days after exception taken, and is plainly getting two days.

The fame.

If the plaintiff except to bail in the vacation, and will not be satisfied with justification before a judge, the bail must justify within the first four days of the next term at least.—It has been held, that a justification before a judge was no justification, but by the plaintiff's consent; but if plaintiff consents, a justification by affidavit is sufficient before a judge. Barnes 102.

The same. Whereas bail put in before a judge cannot

justify by affidavit. Pract. Reg. 81. Barnes 62.

As you may now in this court (by rule Mich. Geo. 2.) in all cases wherein bail-bonds shall be taken, and the same bail shall be put in above, except against such bail—So unless bail so excepted against shall justify themselves, or other bail be added, who shall justify themselves within the time limited by the rules of the court, the plaintist may take an assignment of the bail-bond, and proceed thereon, notwithstanding he excepted to the same persons when put in as bail above. Rich. Litt. Pract. C. B. 1 vol. 104.

If the plaintiff deliver a declaration after the time for puting in bail is expired, as a declaration de bene esse, it is no waiver of the exception to bail; but demanding a plea thereon is a waiver of the exception, for it is admitting the defendant to be in court, and in a condition to plead.

2 Barnes 66.

A notice of justifying.

In the King's Bench or Common Pleas as between { A. B. plaintiff. and the case is }

TAKE notice that E. F. and G. H. the bail put in above for the defendant in this cause, and of whom you have already had notice, will, on Wednesday next, or as soon after as council can be heard, justify themselves in open court, as good and sufficient bail for the above named defendant. Dated, &c.

Yours, &c.

L. M. defendant's atty.

To Mr. O. P. plaintiff's atty.

The notice of justifying should particularly express the names of the bail—and it has been held that a notice that A. B. or two of them, will justify, is bad. Left. 26.

Also, that the parish of their residence is too wide a de-

fignation. Loft. 72. 194.

And a notice given in the name of one of the plaintiff's only, where there are joint plaintiffs, has been held bad. Loft. 237.

Notice of three (generally) to justify is good. Loft 252.

When bail are to justify in court, get the clerk of the judge before whom bail was taken to bring the bail-piece into court, pay him 2s. 6d. If by original, get the philazer to attend with his book, give the bail-piece to the master; and having an affidavit of the service of the above notice, and the bail ready, move, by counsel, to justify by oath in court.

In the Common Pleas, get the philazer or his deputy to attend with the bail-book or bail-piece, and pay him 3 s. 4 d. and then move to justify, &c.

If bail justify at a judge's chambers in B. R. you pay in

term 1 s. in vacation 2 s. each person.

If bail justify at a judge's chambers in C. B. you get the philazer to attend there, and pay him 3 s. 4 d. and at the judge's 2 s.

The affidavit of the service of notice of justifying is as follows:

Between { A. B. plaintiff, and C. D. defendant.

J. S. clerk to L. M. of, &c. gent. attorney for the above named defendant, maketh oath, that he this deponent did, on the day of Nov. instant, serve a notice upon Mr. O. P. who acts as attorney for the above named plaintist in this cause, as this deponent believes, purporting, that E. F. and G. H. the bail put in above for the said defendant, and of whom the said Mr. P. had already had notice, would on Monday then next justify themselves in open court as good and sufficient bail for the above named defendant, by delivering such notice to a clerk of the said Mr. O. P. at

Sworn, &c.

7. 5:

But if bail is taken before a commissioner, and affidavit made before a judge or commissioner, the same may be read in court for justification. Trin. 4 W. & M. But in that case, notice must be given that such affidavit will be produced and read in open court as and for a sufficient justification of bail for the desendant; and having an affidavit of the service of that notice, move by counsel as before. So it is in the Common Pleas by rule. East. 5 W. & M.

An affidavit of justification of bail, is in the following

form :

Between

A. B. plaintiff, and C. D. defendant.

E. F. of, &c. and G. H. of, &c. the bail put in for the above named defendant, severally make oath and say; and first, this deponent E. F. for himself saith, that he is a house-keeper at Taunton aforesaid, and is worth the sum of sixty pounds over and above what will pay and satisfy all debts and demands due from him to any person or persons whatsoever: And this F 4

deponent G. H. for himself saith, that he is a house-keeper at Taunton aforesaid, and is worth the sum of fixty pounds, over and above what will pay and satisfy all debts and demands due from him to any person or persons whatsoever.

Sworn, &c.

E. F.

G. H.

If bail cannot or will not justify, others must be procured for that purpose in their stead, and then the notice must be, "That I. K. of, &c. will be added to the bail already put in for the above named defendant, and that the said I. K. and E. F. of whom you have already had notice, will on Wednesday next, or as soon after as counsel can be heard, justify themselves in court, as good and sufficient bail for the desendant, &c. And then application must be made to the master or philazer to take the acknowledgement of the fresh bail, and then proceed as before.

Upon adding fresh bail, the former are not discharged of their recognizance, but they all continue sureties for the defendant, unless they move to be exonerated; whereupon a rule is made, to strike their names out of the bail-piece.

After justification of bail, you draw up the following rule of the allowance of such bail; with a copy of which the plaintiff's attorney must be served, and the rule itself as in all cases at the same time shewn to him,

Wednesday next after days of in the

B. J Upon reading the affidavit of J. S. it is ordered,

that the bail put in for the defendant, who have
this day justified themselves in court, be allowed, and the bail-piece filed upon the motion
of

By the court.

If no exception to bail is made within a proper time, the desendant's attorney may make affidavit of the service of notice, that such bail was put in upon the back of the bail-piece, [for which oath no see is to be taken,] and file the same with the master or philazer.

One

One who is bail cannot be a witness in the cause for his principal; therefore, if the defendant should have occasion to examine one of his bail as a witness at the trial, he must make an affidavit that such bail is a material witness for him in the cause, and thereupon move the court that such bail may be struck out of the bail-piece on adding and justifying another in his stead.

If time for excepting against bail is out, and they have not justified, they cannot afterwards; but may prevent an

attachment against the sheriff. Loft. 224.

Mr. John Calendar, a merchant, came to justify bail; the fum required was 9000 l. and he regularly justified in that sum, inclusive of his landed property in Jamaica; and this was objected to. Et per cur. His landed property in Jamaica is not liable to the process of this court, and therefore he must be rejected. Boddy v. Leland. 4 Burr. 2526.

If bail do not justify on the day given, and no further day

is given, they are out of court.

W O persons at least must become bail for the desendant, for the putting in one bail is as no bail, not even sufficient to ground a surrender upon, tho' it be done immediately; and the plaintiss in such case may proceed on the bail-bond notwithstanding the surrender, for the desendant cannot be surrendered 'till bail is compleated. Barnes 46, 172. Prast. Reg. C. P. 84. Plow. 69. Cro. Eli. 672.

pl. 31.

But where a defendant, after having obtained a judge's order for time to put in and perfect bail, put in bail and furrendered himself to the Fleet, in discharge of his bail, without previously perfecting his bail by a justification, the court held it to be regular: For before surrender, the defendant is delivered to his bail, and supposed to be in their custody. But by the surrender the custody is altered and the defendant is in prison; the worth and substance of the bail who by the surrender are discharged, is totally imma-

terial. Barnes 58. 2 Barnes 90.

The defendant may furrender himself, or be surrendered by his bail at any stage of the cause; and when he surrenders or is surrendered to the custody of the marshal of the King's Bench, or warden of the Fleet, in discharge of his bail; under the commitment it ought to be added in what state the cause or causes stand at the time of such surrender; if before declaration, the sum sworn to on the arrest; if a declaration hath been siled or delivered, to the sum sworn shall be also added, "declaration filed" or "delivered", "siffue joined" or "interlocutory judgment signed", as the case is. If after final judgment in debt, "the debt and damages;" in other cases the quantum of the damages. East. 8 Geo. 3. B. R.

If the defendant surrenders in discharge of his bail, the bail-piece shall be marked and discharged, otherwise the

plaintiff may proceed against the bail. Comb. 263.

But it feems now, that a bail excepted to, who does not justify, may at any time move to have his name struck out of the bail-piece. For, as he was excepted against, he might reasonably conclude that he was no longer to be considered as bail. I Wilf. 337.

If a bankrupt obtains his certificate pending the action, or before his bail are fixed, they shall be discharged: But if they are fixed before his certificate is obtained, they remain li-

able. Burr. 4 pt. 244.

An impressed man in custody of the Savoy, was brought up by his bail, in order to be surrendered by them in their discharge, and was first committed to the marshal, with orders to deliver him instanter to the keeper of the Savoy, and an exoneretur was entred. Burr. 4 pt. 339.

Bail may seize a bankrupt while under examination, or

going to a court of justice.

When bail above are excepted against and cannot justify themselves, they are considered as no bail, and therefore cannot render the desendant to prison; but other fresh bail may be put in, and before any exception taken they may render him to prison in discharge of themselves. Reg. East. to Geo. 3. C. B.

Bail cannot furrender their principal before the return of

the writ.

Bail surrendered the principal before a judge, and reddidit fe was entred in his book; but no notice was given to the plaintiff's attorney to discharge the bail-piece, and it was held

good.

A. fued B. in three actions, and he put in three bails; plaintiff recovered in all, defendant rendered himself, and one of the bails entered an exoneretur on the bail-piece, the rest did not. Et per cur. The rendering is a discharge in posse to all, but not complete and actual as to all, till exon' entered on all. Williams v. Williams. Salk. 98.

Bail may surrender their principal in discharge of themfelves without perfecting at any time before the sheriff is ruled, but not after if they have been excepted to: But if they have been excepted to then they must justify, and the

bail must be perfected before surrender.

Bail was put in and an exception taken thereto. Defendant within the time for perfecting bail gave notice to add and justify in court, but instead thereof did so at a judge's chamber, and was surrendered to the Fleet; which was held insufficient, the bail not being perfected, and the rule to shew cause why proceedings on the bail-bond should not be stayed was discharged upon hearing counsel. Barnes 67.

Bail fued in debt on a recognizance in B. R. has 8 days after the return of process to surrender desendant. Tr. 1 Anne.

In C. B. on or before the return of the process. Mich. 1654.

And being sued by sci. fa. he may be surrendered at any time before the return of the scire facias, if returned scire seci,

feci, or of the alias feire facies if the first be returned nihil.

But fee title Scire facias against bail in Vol. 2.

A. has a judgment obtained against him, and he renders himself before the return of the capias, but never gives the plaintiff notice of his surrender, nor gets the bail-piece discharged; the plaintiff proceeds to judgment against the bail upon a scire facias; and the court would not relieve them upon motion, because no exoneretur was entered, and a scire facias returned; but put them to their audita querela. Lyell v. Manucapt. Gallelly. Salk. 101.

Defendant surrendered in discharge of his bail, the last day of last term (being the quarto die post of the return of the action of debt upon the recognizance) at a judge's chambers after the rising of the court. The philazer made a general entry of the surrender upon record as done in court. The plaintist moved that the roll might be taken off the sile, and a rule to shew cause was made, which afterwards was made absolute; the surrender not being sedente curia was

too late. Mason v. Bruce. Barnes 66.

Motion to stay proceedings in an action on the recognizance, the principal having been surrendered to the Fleet, and afterwards charged in execution there by plaintiff. Objected, that the defendant had pleaded, and plaintiff demurred, and that defendant's proper method was to amend his pleas. But the court held, that plaintiff could not proceed against the bail after charging the principal in execution. Defendant should have moved sooner, and not pleaded. — Pro-

ceedings stayed on payment of costs. Barnes 66.

The principal was rendered in due time, and notice given the plaintiff's attorney. Reddidit se was marked in the judge's book, and figned by the judge: But was not marked or figned on the bail-piece, which was on hab. corp. and had been delivered by the judge's clerk to plaintiff's attorney to be filed; who did not file it, but proceeded to judgment for want of a reddidit se being entered on the bail-piece. On motion to set aside the judgment against the bail, that the bail-piece might be filed, and the reddidit se entered agreeable to the fact, the court held the practice of plaintiff's attorney in taking away the bail-piece unwarrantable, and fet aside the judgment with costs (defendant having done every thing in his power to make the render effectual.) Defendant consenting to bring no action, and ordered the bailpiece to be filed and reddidit se entered. Knight v. Winter, Bail, Barnes 68. Tie

The court ordered the true time of defendant's furrender to be entered by the *Philazer*, in order that it might appear whether the furrender was made before or after the rifing of

the court. Barnes 69.

Husband and wife were arrested for the wise's debt dum fola. Bail were put in for both, and both rendered to the Fleet in discharge; motion to discharge the wise detained on messe process, not in execution: If the wise had been arrested before the husband, she must have been discharged on a common appearance; after the husband is arrested she cannot be taken into custody again. Rule absolute to discharge the wise by supersedess, on entering a common appearance. Lawford v. Gardiner and wife. Barnes 96.

Rule made absolute (on affidavit of service and no cause shewn) for leave to enter an exoneretur on the recognizance of bail; defendant pending the action having become a bankrupt, and obtained his certificate. Barnes 104.

Note—This had been done in B. R. and is a practice introduced to discharge the bail in a summary way, without putting them to the trouble and charge of surrendering the principal, as formerly; though by the bankrupt act 5 Geo. 2. power is given to a judge to order the bankrupt after such

furrender to be discharged.

The bail-piece was lost, on which the bail moved that a new bail-piece might be filed, in order that he might surrender the principal [who had been actually in custody of the bail for some days] which he could not do for want of a bail-piece; and the the plaintiff refused to consent, yet the court gave leave to put in bail de novo, on hearing the whole matter; which was done; and then the bail surrendered. Barnes 108.

If a defendant renders himself, or is surrendered by his bail in discharge of themselves; the method is for his attorney to produce him and the habeas corpus or bail, on which ever the surrender may be, either in court [if sitting] or before a judge at his chambers.

If at chambers, the judge's clerk will make out the committitur, and deliver him to the custody of the tipstaff, to be

conveyed to the King's Bench or Fleet Prison.

Under the committitur it ought to be added at what state the cause stands at the time of such surrender made.

The reddidit fe, or writ of babeas corpus with the return, must remain with the secondary- if he was surrendered in

court, or judge's clerk if furrendered before a judge, to be filed; and a copy or note only of fuch furrender or return of the writ of habeas corpus, under the hand of fuch judge or fecondary, shall be delivered to the marshal or warden at the time of committing such person to his custody.

Notice of the furrender must be given to the plaintiff's attorney without delay, and affidavit made thereof before

the bail can be discharged.

After the notice given and affidavit thereof made [and an entry of the surrender made if in B. R. in the marshal's book kept in the King's Bench office] a certificate must be got from the prison-keeper that the defendant is in his custody, and the bail-piece from the judge's chambers, [if the surrender was made there] properly marked; on producing of which, together with the affidavit of the service of the notice on the plaintiss attorney, to the master of B. R. or filazer of C. B. an exoneretur will be marked on the bail-piece. For till that is done the bail continue liable; after which the same must be filed.

Of proceeding on the Bail-bond.

THE plaintiff has his election, either to accept an affignment of the Bail-bond from the sheriff, or proceed

against the sheriff by amercements.

Before a plaintiff takes an affignment of the Bail-bond from the sheriff [pursuant to the 4 & 5 Anne, c. 16. s. 20.] he should be satisfied that the sureties taken by the sheriff are able to answer his debt; for by accepting an affignment he admits the sufficiency of the sureties, and therefore can never resort back to the sheriff, who was obliged to take a Bail-bond. Nor can he, if the same sureties become bail to the action, except against them in the court of King's Bench, tho' he may in the Common Pleas. And for the same reason, if the sureties to the sheriff are put in as bail to the action, and plaintiff excepts against them, his taking an affignment of the Bail-bond will be a waiver of his exception. Salk. 99.

By the statute of Anne above-mentioned, the sheriff is bound at the request and cost of the plaintiff or his attorney, to assign him the Bail-bond by indorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses, without stamp, provided it be stamped before action is brought thereon: And if the security be forseited, the plaintiff, after assignment, may bring an action thereupon in his own name: And the court may, by rule, give such relief to the plaintiff and defendant in the original action, and to the bail, upon the security, as is agreeable to justice, and such rule of court shall have the

nature of a defeazance.

If Bail is not duly put in above, or if excepted against they do not justify in the time limited by the rules of the court as before, and the plaintiff would obtain the Bail-bond from the sheriff, he should apply in the following manner:

If in Middlesex, apply to the undersheriff at his office in Tookes-Court, Cursitor-Street; or if in London, to the secondary of the Compter where the Bail-bond was taken; or if in the country, to the undersheriff, who is bound to indorse an affignment thereon, and deliver it to the plaintiff on his attorney applying *.

After affignment of the bond, get it stamped at the Stampoffice with a double sixpenny stamp, and then sue out writs
against the principal and bail, and proceed therein as in

other actions.

If the arrest were in London or Middlesex, the Bail-bond cannot be put in suit till

In Middlesex you pay 5 s. for the adigmment; in other counties they differ, but not much.

Of proceeding on the Bail-bond.

Four days exclusive after. the return of the writ in B.R.

If the arrest be in any other city or county till fix days exclusive after the return of

the writ in B. R.

A Latitat was returnable on Wednesday, and upon de- fide with costs. Hile o Anne. bate it was held, that the Bail-bond could not be affigned until after Monday. For the faur days are to be one inclusive, and the other exclufive, and where the fourth day is Sunday, the party has all the next day to put in Bail. Bullock v. Lincoln. 2 Stra. 914. Ibid. 782.

Four days exclusive of the appearance day of the return of the writ on which the Bail-bond was taken in C. B.

In C. B. eight days exclufive of the appearance day of the return of the process, and all proceeding to the contrary thereof that be fet :-

An under-sheriff may affign a Bail-bond, but an under-

sheriff's clerk cannot. Ser. 60. 10 Med. 288.

Sheriff or under-sheriff may affign the Bail-bond out of his county, and the action may be brought where the affignment was made. 2 Str. 727. Ld Raym. 1455 Fort. 366. And note, in an action on a Bail-bond the arrest is not

traversable. Stra. 444. 643.

Also an action on a Bail-bond mult be brought in the court where the bail was given. 4 Burr. 1923. 3 Wilf. 348. Barnes 92. and the venue in the action laid in that county in which the bond was taken or the affigument made.

The action must be brought in the same court, even tho' the bail be an attorney of another court. For, per cur. by entering into a Bail-bond the defendant has waived his privilege whether fued jointly or feverally. Barnes 117.

In an action on a Bail-bond the defendants are not to be held to special bail, for that would be bail ad infinitum; so

you proceed thereon by service of copies of process.

After an exception to bail put in before a judge, defendant added bail, but did not justify in court pursuant to the rule for perfecting bail in four days. Plaintiff proceeded on the Bail-bond without excepting against the bail, and held regular. Barnes 74.

If a plaintiff has accepted an affignment of the Bail-bond, the court wont grant him a rule upon the sheriff to return

the writ. Lord Brooke v. Stone. 1 Will. 223.

Of

Of flaying proceedings on the Bail-bond.

Lake an alignment of the bail-bond, and would wish to stake an alignment of the bail-bond, and would wish to stay the proceedings thereon, he must first justify his bail as before directed, then move the court on assistant of the saits, or take out a summons before a judge at his chambers to show cause why the proceedings on the bail-bond should not be set assis; which the court will direct upon terms; — that is, upon the desendant's consenting to pay the costs incurred, by the bail-bond being assigned to be taxed by the Master, thereving a declaration in the original action, pleading is supply, and taking short notice of trial, so that the cause may be tried in term. — But if the plaintiff has lost a term, the court will require that the bail-bond for the plaintiff is security. However, if the delay is through his own neglect, it is otherwise.

As where the defendant died before judgment could be obtained against him in the original action, the court flayed the proceedings on the bail-bond: — But if the defendant lives so long after the arrest, that if he had put in bail in time, the plaintiff could have obtained judgment and execution against him, the court will not stay proceedings on the bail-bond.

The original action was brought in Mich. term, and for want of bail, the bond was affigned in February; after which the defendant died, and the bail moved to stay proceedings against them, the plaintiff not having obtained judgment on the bail-bond. On hearing counsel, the court ordered the proceedings to be stayed on payment of costs, being of opinion, that the matter was never carried farther than the bail-bond standing as a security for what should be recovered on the trial: And if that had been the case, the desendant had died before trial, the suit would have been at an end. The plaintiss might have proceeded more speedily, and if any inconvenience happens to him, it is through his own laches. Heath v. Asser. Barnes 61. like case 62.

But where a defendant becomes a bankrupt, and obtains his certificate, the court will flay the proceedings on the bail-bond.

A motion must be made to stay the proceedings on the bail-bond; and previous to it, notice thereof must be given to the plaintiff's attorney, and an affidavit of the facts, and also of the service annexed to a copy thereof, to ground such motion.

Vol. I.

Of staying proceedings on the Bail-bond.

Defendant put in the same bail before a judge in due time, as were bail to the sherist, plaintist excepted to them, and for want of addition or justification took an assignment of the bail-bond, and proceeded thereon. Defendant moved to stay proceedings upon the bail-bond; alledging, that plaintist, by taking an assignment of the bond, had admitted the bail to be good: But the court resused to stay proceedings, the plaintist by a late rule in this court, [i. e. in C. B.] Mich. 6 Geo. 2. being at liberty to except against the bail above, altho it be the same bail as was taken by the sherist. Barnes 63. — But note, in B. R. it is otherwise; for if bail below become bail above, you cannot except to them. Pyke v. Puidlebury. Mich. 1742. Ld. Brooke v. Stone. 1 Will, 223.

An action was brought fome time fince by A. against B. foon after which B. became a bankrupt, and obtained his certificate, allowed and confirmed: Notwithstanding which the bail-bond was fometime afterwards put in suit in the sheriff's name, against one of the bail, and on his applica-

tion proceedings were flayed. Barnes 105.

The writ was returnable in Mich. term. — Bail was taken before a commissioner, notice given thereof, and the bail-piece transmitted to defendant's agent; he incautiously filed it with the Filazer [it being in C. B.] who as incautiously received it, without first being allowed by a judge.— Plaintiff lay by till Easter term, and then put the bond in suit. The court ordered the Filazer to attend a judge for his Allocatur, gave plaintiff leave to except against the bail, and stayed proceedings on the bail-bond. The plaintist's counsel urged that he had been delayed, and lost a trial. Per cur. Such delay is through his own laches: He might have put the bail-bond in suit much earlier than he did. Barnes. 103.

Bail bond taken. The Capias in the original action was returnable first return of Hilary. Defendant obtained time to perfect bail till the last day of that term, taking notice of trial for the sitting after that term: Bail not being perfected, the bond was assigned and put in suit. The original desendant dying 8th of April, the bail applied to stay proceedings, the desendant dying before judgment could be obtained against him. On shewing cause the rule was discharged, the court holding that the plaintist had been delayed if the desendant had perfected bail in time, for plaintist might have tried his action after that term; and by stat. 17 Car. 2.

Of staying proceedings on the Bail-bond.

might have entered his judgment therein after the defendant's death. Morley v. Carr. Burnes 112.

Exception to bail was the 14 Feb. 1758. Bail justified in court the third day within the Easter term following, same bail as in the ball bond. On motion to stay proceedings on the bail bond, it was held that bail cannot justify in vacation, unless by consent, four days to justify in full term are allowed after exception taken in vacation time. Rule absolute. Bradbury v. Pinchbeck. Barnes 115.

On bail-bond, rule to flew cause why proceedings should not be set aside with costs, defendant having surrendered himfels to the Flier prison, in discharge of his bail before the bail-bond was put in suit; objected by plaintiss that the surrender being after an exception against the bail, was irregular, and void for want of a previous justification. The objection was overruled, and the rule made absolute with costs. Barnes 117.

On bail-bond, rule to shew cause why proceedings should not be stayed on an assidavit "that desendant in the cause had been arrested, and had thereupon been admitted to bail, and this bail-bond entered into, after which, and before the return of the writ, he had surrendered himself to the sheriss." This very state of the fact disclosed by the assidavit made in support of the rule, was shewed as a reason for discharging it. — And per Ld. Manssield it is a settled point, "that nothing can be a performance of the condition of a bail-bond, but putting in bail; and the rule to shew cause was discharged with costs," Harrison assignee v. Davies and an. Burr. 4 pt. 2683.

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After bail-bond forfeited, if the court of favour stay the proceedings thereon, the defendant cannot afterwards plead in abatement to the original action, but must plead in chief. Salk. 519.

The writ was returnable in Easter term, and bail-bond taken, and no proceedings were had till October 24, when the bail-bond was assigned, and special bail put in the next day. It was insisted, that the plaintist ought to have delivered a declaration de bene esse, and thereby quickened the defendant: But the court held he was not bound so to do; and the desendant was in the first sault, whereby plaintist lost a trial; so the desendant was forced to consent, to let the bail-bond stand as a security. 2 Str. 1292.

Of flaying proceedings on the Bail-bond.

A defendant may fet afide an affigument of the bail-bond on putting in and perfecting bail by motion; but it will be less expense to do it by furmions before a judge, unless plaintiff is irregular in taking the affigument; and then motion will be proper because the court will subject defendant to the costs incurred by his suffering plaintiff to assign the

bail-bond.

Motion to set aside proceeding on bail-bond affigned and put in suit Oslober 31, returnable tres Mich. and being a country cause, desendant had 8 days [it being in G. B.] after the appearance day, exclusive to put in bail, and the bail-bond could not be put in suit till November 1. For plaintiss it was insisted, that the bail-bond might be affigned at any time, though it could not be put in suit, which are the words of the act and general rule of court. Per cur. There is no occasion to decide this matter here, the bail-bond is put in suit too early. The Capias on the bail-bond affigned, appears to be sued out Oslober 31. The proceedings were set aside. Barnes 77.

Before the plaintiff has lost the opportunity of trying his cause, the desendant may summon him to shew cause why all proceedings on the bail-band shall not be stayed: But afterwards neither judge nor court will grant the desendant any redress, and even a judge will oblige the desendant to perfect his bail before he will make any order; and also to pay costs, receive a declaration in the original action, plead to iffue, and take short notice of trial for the sitting in

the then term. Rich. Att. Pract, B. R. 150.

Defendant was furrendered by his bail to the King's Bench prison instead of the Fleet, by mistake. He was afterwards surrendered rightly, and the bail moved to stay proceedings on the bail-bond. A rule was made, but was discharged on hearing counsel, the plaintiff having been delayed of a trial. Barnes 64.

When the bail-bond is ordered to fland as a security for plaintiff's demand, it ought to be expressed that judgment thereon, but execution only stayed until, &c. Barnes 85.

^{*} If the defendant does not pay the coffs, the plaintiff must proceed on the bail-bond; as if no order had been made.

Of proceeding against the Sheriff to compel a justification of Bail. &c.

IF Bail is not put in in time, and plaintiff diflikes the furcties taken by the theriff, of it the furcties below become bail above, the plaintiff or his attorney (having in the latter cale entered at exception in the judge's book, or the filazer's, as the case is, and given notice thereof as before is directed) may take out a rule with the clerk of the rules in B. R. or prothonorary in C. B. for the theriff to return the write

But it plaintiff has accepted an affigument of the bailbond, the court won's give him a rule upon the sheriff to return the writ. Lord Brook v. Stone. 1 Wilf. 223:

The above rule is a four day rule in B. R. and fix day rule in O. B.; a copy of which must be served on the sheriff of his under-fouriff, or one who acts for him in that capacity will be sufficient, and at the expiration thereof call upon him for a return.

If the sheriff return a Cepi corpus, or neglects to make any return, you take out a second rule for him to bring in the body of the desendant; which, as the sheriff admitted him to bail, he cannot comply with .— But the design of it is, to cause good bail to be put in above, and if that he done the sheriff will be in no danger of an attachment.

At the expiration of this second rule, if the bail already put in do not justify, or if others are not put in above who justify, you move the court upon an affidavit for an attachment against the sheriff. Whereupon a rule for the attachment will be made absolute.

The form of an affidavit to ground an attachment against the sheriff may be as follows:

In the King's Bench.

Between

A. B. plaintiff,
and
C. D. defendant.

E. F. of, &c. gentleman, maketh oath, That he this deponent did, on the day of last, serve the rule to return the bill of Middlesex [Latitat Capias or whatever writ it be] issued in this cause hereunto annexed, by

^{*} To whom you pay 4 s. fer the fame.

Of proceeding against the Sheriff to compel a justification of Bail, &c.

delivering a true copy thereof to G. H. who acts as or for the theriff of the county of Middlefex, and at the fame time shewed him the said annexed rule: and this deponent further day of Jaff, he this defaith, that on the ponent searched at the King's Bench office, with the proper officer there for the return of the said bill of Middles in the faid rule mentioned, and thereupon found that the same was not returned and filed : And this deponent further faith, that on the day of inflant he this depo-nent, in like manner as aforefaid, served the faid G. H. with the rule to bring in the body of the faid defendant in this. cause, also hereunto annexed, by delivering a true copy thereof to the faid G. H. and at the fame time thewed him the faid original rule; and this deponent faith, he hath duly fearched the several special Bail-backs of the right hon. the Lord Chief Juffice, and the other three judges of this honourable court, and thereupon found that no special bail was put in, or had justified themselves in this cause.

Sworn, &c.

Having made this motion, draw up a rule for an attachment with the clerk of the rules in B. R. or secondary in G. B. for which is paid 5 s. then take the same to the Groun-office in the Temple, where the attachment is made out, directed to the coroner of the county, for which attachment is paid 13 s. 4 d.; then carry the attachment to the coroner, who makes out a warrant thereon, and attaches the sheriff. On the return of the attachment, you call upon the coroner, who will pay the money, charging about a guinea for his fees.

The plaintiff proceeds in this method by attachment, when the same sheriff is in office who returned a Cepi corpus, and does not bring in the body. But if the sheriff is gone out of office who returned a Cepi corpus, the successor is not served with an attachment, but a distringus is the method of enforcing him to bring in the body. And note, if writs of distringus issue against such sheriff, the court, on motion, will direct the issues to be fold, and that the plaintiff shall be paid his costs out of the monies levied thereby. For it was held in B. R. in the case of Raban v. Plaistow. Burr. 4. p. 2726. I hat the third clause of the 10 Geo. 3. c. 50. re-

Of proceeding against the Sheriff to compel a justification of Bail, &c.

lates to all writs of diffringas in general, and is not confined

to fuch as concern privilege of parliament only.

The court in that case of Raban v. Plaislow on a distringus against the theriff, on motion ordered the issues to be sold, and the costs incurred by the fault of the sheriff to be taxed, and paid to the plaintiff out of the money arising thereby, and the relidue to be retained in order to answer the event of the fuit.

If upon a rule to return the writ, the sheriff returns a Non of inventor, when he had really arrested the defendant, an action may be brought against him for such false return, in which action the jury may give the plaintist's whole debt in damages. Stra. 650.

Note, That an attachment against the sheriff for not bringing in the body, must not be moved for until exception hath

been made to the boil. Left. 159.

All rules to return writs should be served on the under-sheriff; but the rule to shew cause why an attachment should not iffue against the sheriff, should be served on the sheriff himself.

The practice of both courts is, that the form of all rules upon sheriffs be, that the sheriff shall do the act required

upon notice to his under-sheriff. Vide Barnes 30.

Motion to discharge proceedings against sheriff upon circumstances, viz. the bail to the sheriff was good, when defendant was arrested 4th August, and the sheriff was obliged to take bail under the statute, Hen. 6: but the bail since were become insufficient, denied: but enlarged the six day rule to bring in the body three days surther. Barnes 180.

Rule for sheriff to bring in the body within six days [C. B.] which the sheriff did not. Plaintiff moved for an attachment, and had a rule to shew cause. The sheriff shewed for cause, that bail was put in and justified. But it appearing that they had not justified before plaintiff applied for the attachment, the court ordered that on payment of costs the rule should be discharged. Barnes. 80.

Defendant was arrested last term, but no bail-bond taken; the sheriff being called on, returned a Cepi corpus: and being served with a peremptory rule to bring in the body, bail was persected in court, and the rule to bring in the body discharged, but the sheriff ordered to pay the costs of the appli-

G 4

Of proceeding against the Sheriff to compel a justification of Bail, Gc.

cation, as the time for bringing in the body was expired, and

the plaintiff entitled to move for an attachment. Burne 98.

Defendant put in bail before a judge, plaintiff gave notice of exception, but did not enter the exception on the bail-piece, and for want of a justification in court ferved the piece, and for want of a justification in court ferved the sheriff with a peremptory rule to bring in the body within fix days; for want whereof plaintiff moved for an attachment against him. The court held that an exception in writing on the bail-piece, and notice thereof to defendant's attorney, are both necessary. And that for want of the former, the bail [which had stood more than 20 days without an exception entered] was become absolute, and ordered proceedings against the sheriff to be stayed. Barray 102.

Plaintiff served the late theriff with a peremptory rule to bring in the body in fix days [being in G. B.] whereupon defendant put in bail, and justified de bene esse before a judge, and for want of an exception within 20 days, the bail became absolute. Plaintiff infifted that though no exception was taken, the bail ought to be perfected by a justification in court (which is bringing in the body) within the fix days limited by the rule. But the court held otherwise, and dif-

Of Summonies and Orders for time to put in. add to perfect and justify Bail, &c.

CUMMONSES and orders may be taken out by plaintiffs and defineants for various purpoles, from the commence-ment to the end of a cause; and a great deal of business, which is seldem or never heard of in Westmirster-ball, is transacted by means of these summonles and orders at the chambers of the respective judges. — But in this place I shall more particularly speak of summonles and orders for time to put in, and to, perfect and justify bail.

Summonles may be taken out before any judge of the court wherein the action is brought, for which is, is to be paid; and the same for every reversal, whether it happen to be in terms.

be in term or vacation.

If a fummons be returnable before the time for putting in bail, pleading, &c. be out or before an order be expired, the profession and practicers generally consider it as a stay of the proceedings till there hath been an attendance thereon before the judge. But if the fummons be not returnable till after the time, wherein the plaintiff hath a right to proceed, it is no flay, being then confidered as a trick to impose on the judge, the court, or the party.

True and examined copies of all fummonles must be ferved on the adverse parties, their attornees or agents; and in case the disobedience of the order to be obtained thereon incurs a contempt, the parties themselves must be served, and that too perforally; and so they must in case they have no attorney or agent. Rich. Pract. K. B. 1 Vol. 146.

If the fummons is for any matter which the fuitors of the court are bound to obey, the non-attendance of the attorney, or the non-compliance of his client, will subject them (the judge's order being first made a rule of court) to an attachment of contempt, ibid.

Wherever a party disobeys a judge's order, and the party who applied for it would with to enforce it by attachment, he must previously move to make the judge's order a rule of court; and then move for an attachment, which the court will, in some cases, grant in the first instance; but generally a rule is first granted to shew cause why an attachment should not iffue against the party.

To obtain an order ex parte the summoner must wait at the judge's chambers an hour; and in case neither the party fummoned, nor his attorney or agent attends, on being regularly served with three summonses, and affidavit of having

Of Summonfes and Orders for time to put in, add to, perfect and justify Bail, &c.

having fo done, the judge will make an order for the purpose applied for and set out in the funmous; which affidavit may be to the following effect:

In the King's Bench.

A. B. plaintiff, against C. D. defendant.

E. P. of, &c. clerk to G. H. attorney for the (party in the cause who took out the summons) maketh oath that he this deponent on the 22d, 23d, and 24th days of this instant April, did serve the three several original summonses hereunto annexed by delivering true copies thereof unto Mr. J. K. who acts as attorney or agent for (the party in the cause who is summoned) as this deponent hath been informed and believes, and at the same time shewing the said summonses; and this deponent surther saith, that on the said several days and times berein and in the said summonses respectively mentioned, he this deponent did accordingly duly attend thereon, but that the said Mr. J. K. or his agent, or any person on either of their behalfs, on any of the said three several days or times as aforesaid, did not attend thereon.

Sworn, &c.

E. F.

The foregoing affidavit must be engrossed on a 1s. 6d. stamp, and sworn before one of the judges (usually that judge before whom the summons was depending). — You pay for each of the orders and all others 2s. besides oath, which must be served in the same manner as the summonses.

When a judge makes an order for time to put in, add to, perfect or justify bail, and for time to plead, &c. it is usually on terms, such as, pleading issuably, rejoining gratis, taking short notice of trial, or inquiry (if necessary) within term.

^{*} If not necessary to be served personally, say by leaving true copies thereof at the house of Mr. J. K. situate in, &c. with a pertion there, who informed this deponent he was clerk or servant, (as the case is) to the said Mr. I, K.

But

Of Summonses and Orders for time to put in, add to, perfect and justify Bail, &c.

But a judge will not hold a defendant to all those conditions on granting the first order, unless the state of the cause requires it, or the party summoned ought to submit it to them for not making application sooner; and such neglect was owing to his own wilful laches. When a defendant in a sown cause applies for time to

When a defendant in a town cause applies for time to put in, add to, perfect and justify bail, or to plead; a judge will not grant any orders, but upon condition, that his

attorney undertakes to plead an iffuable plea.

If a fummons be for common instead of special bail, no order will be made, unless the application be supported by an affidavit of sacts.

Where a defendant is held to special bail upon a defective affidavit, he may have a summons to shew cause why common bail should not be accepted.

If defendant be detained in custody, after having perfected his bail, he may procure his enlargement before a

judge upon fervice of three fummonfes.

The first summons for a supersedes on plaintiff's not having declared against a prisoner in two terms after the return of the writ is peremptory, so that a judge will make an order thereon to discharge the defendant, on plaintiff's neglecting to attend, or some person in his behalf. Vide title prisoners", post.

Note, The validity of a judge's order can be impeached but two ways: — either by appealing to the court to fet it aside; or, if made in vacation, by applying in the next term, to set aside the proceedings that have been had under it.

And if any one disobeys a judge's order, and the party who applied for it would wish to enforce it by attachment, he must previously move to make the judge's order a rule of court.

Df the Declaration.

When to be delivered or filed, and to whom.

HEN the defendant has appeared, or filed common bail, or plaintiff (according to the statute of 12. Geo. 1. c. 29.) has done it for him; the next step the plaintiff is to take is to declare against him, i.e. to recite at large his cause of complaint; and herein much nicety is required in stating the matter or nature of the complaint, with the additions of time, place, and circumstance. There are apt forms of these declarations for the particular sorts of actions, and also for prosecuting them in the different courts.

On a bill of Middlesex or Latitat, plaintiff may declare in any action.

A bill of Middlesex, and declaration qui tam is good. 2 Stra. 1232.

Writ general and count, as exer. or qui tam, or et affignee of the sheriff, good. Stra. 1232.

A copy of the declaration must be delivered to the defendant's attorney, if he is known, and not to himself. Trin. 12 W. 3.

Or, if a country attorney is concerned, to the agent in town.

A copy of the declaration ought to be delivered before 9 in the evening.

If the defendant appears, the declaration should be of

that term the writ is returnable.

If the defendant's attorney refuses to pay for the copy, it may be left in the office, and plaintiff proceed and give a rule to plead and demand plea, [which is not to be received till copy of declaration paid for] and for want of it sign judgment. Attor. Prast. B. R. 125.

Df the Declaration.

When to be delivered or filed, and to whom.

So on a common capias quare clausum fregit, the plaintiff may declare for any cause of action; for that process is only to bring the party into court. Pract. Reg. C. P. 136.

On a clausum fregit with an "ac etiam" in debt, case, or any other action, the plaintiff may declare in any county, or for any cause of action whatsoever; but then he will lose bis bail. Pract. Reg. C. P. 137.

A common capias quare clausum fregit, and decl' qui tam, is

good. 2 Will. 141.

But in a pracipe quod reddat in debt, the plaintiff can deelare in no other action but debt, except he deliver a declaration by the bye, and in that case he must first deliver a declaration in the original action. Pract. Reg. C. P. 137.

The fame in this court. Atty. Pract. 115.

The fame in this court, But where a declaration has been accepted in the country, and over of the bond demanded and given there, and a plea demanded there, the court has refused to fet aside the judgment for want of a plea, the defendant having agreed to this method by accepting the declaration in the country. Rich. Atty. Prast. C. B. 115.

The same in this court. East. 10 Geo. 3.

Not necessary in C. B.

The same in this court. Pract. Reg. 126. Pract. C. B.

Where neither defendant nor his attorney can be found, the court on motion will order notice in the office to be good, unless bail shew cause to the contrary. 2 Barnes 243.

The

When to be delivered or filed, and to whom.

So a copy may be left in the office if the place of abode of defendant's attorney is not known; but fuch copy is not well delivered but from time of notice, which must be given to the defendant or his attorney. Tr. 1 Geo. 2.

So if bail is filed by the plaintiff, the declaration must be filed in the office, and notice given to the defendant by delivering or leaving for him at his last or usual place of abode, a note in writing, signifying the nature of the action, at whose suit prosecuted, and the time allowed by the rules of the court for pleading thereto, and unless he plead in that time judgment will be entered by default, and need not afterwards call further for plea. Tr. 1 Geo. 2.

The form of notice is as follows:

In the King's Bench.

A. B. Executor of the last will and testament of C. D. deceased, plaintiff, against E. F.

Take notice, that I have this day left in the office of the clerk of the declarations in the King's Bench effice in the Inner Temple, London, a copy of a declaration as of last Trinity term against you, at the suit of A. B. executor of the last will and testament of C. D. deceased, in an action of * trespass on the case upon several promises made by you to the said C. D. in his lifetime, in which said declaration the said plaintist has laid his damages to thirty pounds, and that unless you plead to the said declaration within the first four days of next Michaelmas term, judgment will be entered against you by default.

I. M. attorney for the plaintiff.

To E. F. defendant in the above cause.

Off. 1779.

^{*} A notice of the declaration must set forth the nature of the action; otherwise it is irregular. Graves v. Wise. C. B. 2 Wils. 84. And where the notice was a declaration in an action of trespass on the case, without further description, it was held insufficient. The intent of the rule being, that desendant should know what he was sued for. Actions on the case upon contracts, and for torts, are widely different. On several undertakings and promises, or at least on promise, should have been added. Hil. 29, Geo. 2. Taylor v. Oxley. Supplement to Barnes 44.

When to be delivered or filed, and to whom.

The fame in this court. Prad. Reg. 131. a Barnes

The fame in this court. Mich. 1 Geo. 2. ___ In this court to be left in the Prothonoturies office.

There's and other test of the Real of the

Vide the form of notice opposite-

In this court if the plaintiff appears, he may proceed without taking any notice of any attorney the defendant may have employed, though the defendant gave the plaintiff notice. Barnes 177. Att. Pract. 112.—But the plaintiff must give notice though the defendant in the action is an attorney. Pract. Reg. 128.

Note—The appearance by the plaintiff for the defendant must be before the declaration delivered. Prast. Reg. 31. 145. unless it is delivered de bene esse. Ibid. 146.

The copy of the declaration in either court must be ingrossed on a treple penny stamped paper, for which the plaintist's attorney charges 4 d. per sheet (reckoning seventy two words to a sheet) which the defendant's attorney must pay for, besides stamps, and eight-pence for filing his warrant of attorney. If the declaration is delivered to desendant's attorney in C. B. you give a rule with it for the desendant to plead, with the secondary of that prothonotary with whom you enter your proceedings—for this rule you pay 1 s. 10 d. viz. 1s. 6d. for the king's duty, and 4 d. to the secondary for the rule.

If defendant's attorney does not pay for the copy of the declaration, &c. the plaintiff's attorney may leave the fame in the office, and having given a rule to plead, and demanded a plea, may fign judgment for want of a plea, and the plea is not to be received before the copy of the declaration is paid for.

Before

When to be delivered or filed, and to whom.

Where bail is filed by the defendant, there must be a pleademanded in writing, although notice to plead be upon the declaration. I Wilf. 134.

The plaintiff must declare before the end of the term after which the writ was returnable, or may be non prosid. Prass. B. R. 132. [except he has a rule for time to declare,] and defendant is not bound to accept a declaration afterwards. ibid. 133.

The declaration was filed on the last day of the fecond term; but notice not given till just before Essign-day of the

third term, and held good. 4 Burr. 1452.

Latitat was against two returnable in Mith term: one appears, and plaintiff files a declaration against him, and took out an alias capias returnable in Hil. term against the other defendant; on which he appeared: and then the plaintiff filed a new declaration against both as of Mich. term.

The first was void and the second wrong dated. I Wils.

242. But the court refused to stay the proceedings, for

plaintiff might amend.

In all process sued out of this court whereon desendant is arrested and held to special bail, returnable the first or second return of any term, i. e. before the third return of term.— If the plaintiff declares in London or Middlesex, and the defendant lives within 20 miles of London, the declaration shall be delivered with notice to plead within sour days after delivery (exclusive of the day of delivery) and the desendant shall plead within the same sour days without any imparlance. Reg. Trin. 5 & 6 Geo. 2.

If plaintiff declares in any other county, or defendant lives above twenty miles from London, the declaration shall be delivered with notice to plead within eight days after the delivery thereof [exclusive] and the defendant shall plead

within that time without imparlance. Same rule.

But in both the foregoing eafes the declaration must be delivered at least four days before the end of the term exclusive of the day of the delivery, otherwise the desendant is enti-

tled to an imparlance. Same rule.

If the defendant escape and is taken on escape-warrant, the plaintiff has time to declare till the end of the second term after his being taken on escape-warrant. Pract. B. R. 133. And if plaintiff do not declare in that time such person may be discharged by supersedeas. 6 Anne. But vide prisoners, post.

When to be delivered or filed, and to whom.

Before the plaintiff's attorney can fign judgment, he must by note in writing demand a plea of the defendant's attorney, except where the plaintiff has entered an appearance for the defendant. Mic. 1 Geo. 2.

The plaintiff has two terms to declare after bail is com-

pleate Prad. Reg. 121.

The plaintiff has the whole vacation of the fecond term to declare, if not called on fooner by rule. Pract. Reg. 21. Hil. o Anne. - But if called on fooner by rule, he must declare before the end of the fecond term, or within four days after the rule given; but the defendant cannot fign a nonprofs till rule given to declare and demand of declaration made in writing. Pract. Reg. C. B. 110. which must be made of the agent in town. Pract. Reg. 124. I Barnes 225. Of non profs, vide poft.

The same in this court; - but the days are inclusive of the day of delivery. Reg. Mich. 3 Geo. 2.

And by Trin. 8 Ges. 3. where process is returnable the third return of term, the declaration being delivered 4 days exclusive before the end of the term.

The same in this court. East. 3 Geo. 2. but the days are inclusive of the day of the delivery.

If a declaration is left in the office before appearance, and not marked de bene effe, this is bad, and judgment may be fet I Barnes 109.

When to be delivered or filed, and to whom.

A declaration may be delivered on a Sunday. In trespossible de good, but 2. In ejectment, for that is in the nature of process.

When to be delivered or filed, and to whom.

Declarations on Special writs in the fame term the faid writs are returnable, shall be delivered or left in the office at least four days before the end of every term, exclusive of the day of delivery or leaving in the office. Hil. o Anne.

Irregularity in delivery, or notice of declaration to be complained of two days before executing the writ of enquiry.

Pract. Reg. 127.

The declaration is only well delivered from the time of notice, and therefore if notice of the declaration be given after the rule to plead is given, it is irregular. Pract. Reg. C. P. 131. Rep. & Caf. of Pract. C. P. 111. Barnes 173. If a defendant has eight days to plead, and declaration is

If a defendant has eight days to plead, and declaration is delivered with notice to plead in four days, it is irregular, though judgment be not figned 'till the eight days are expired. Barnes 222. Prast. Reg. C. P. 135.

The same in this court.

Declaration in ejectment delivered on a Sunday, held good. 2 Barnes 148.

Of delivering Declarations de bene effe.

N all process returnable the first or second return of any term, i. e. before the third general return, where no affidavit is made of the cause of action so as to arrest the defendant, the plaintiff may deliver a declaration de bene effe at the return of the process, with notice to plead in eight days after delivery; and if affidavit is made then with notice to plead in four days after the delivery if the action is in London or Middlefex, and if defendant lives within 20 miles of London - and in eight days if action laid in any other county, or the defendant lives above 20 miles from London. Mich. 10 Geo. 2.

The notice of delivering a declaration de bene effe till Com-

mon bail is put in, is in the following form:

In the King's Bench.

{ A. B. plaintiff, and C. D. defendant.

Mr. C. D. Take notice that a declaration is filed against you in the King's Bench office in the Inner Temple, London, with the clerk of the declarations, there conditionally till common bail filed in an action of trespass on the case on promise, at the suit of A. B. the plaintiff in such action; and unless you plead thereto within eight days after service thereof, judgment will be entered against you by Dated the day of

To E. F. defendant in the above caufe. T. N. plaintiff's attorney.

Indorfed thus on the back.

This declaration is filed conditionally till common bail filed, and the defendant is to plead thereto in eight days.

Vide the form of notice of a declaration filed de bene effe till

special bail put in opposite.

Of delivering Declarations de bene effe.

THE same in this court. East. 3 Geo. 2.—only the days are inclusive of the day of delivery.

Vide the form of notice opposite, which is the same in this court, only stating it to be filed with the prothonotary.

And the form of notice of a declaration filed de bene effe till special bail be put in, is as follows:

In the Common Pleas.

A. B. plaintiff, and C. D. defendant.

Mr. C. D. Take notice, that a copy of a declaration in this cause is left conditionally (until bail above be put in and perfected) with the

as of this present Michaelmas term against you, at the suit of the above named A. B. in an action of trespass on the case on several promises; in which said declaration, the said plaintiff hath laid his damages to and unless you put in bail above, and plead to the said declaration within sour days after this notice (a rule to plead being this day given) judgment will be entered against you by default. Dated the 6th day of Nov. 1779.

Your humble fervant,

To C. D. defendant in the above cause.

11

G. H. and I. K. for the plaintiff.

Indorsed thus on the back.

This declaration is filed conditionally, and the defendant is to plead thereto in four days.

Wherever a declaration is lest in the office de bene esse, there ought to be an indorsement on it, signifying that it is lest conditionally, or de bene esse. Barnes 189. Sed vide post.

H 3

The

Of delivering Declarations de bene offic.

In Burgh v. Dixon, B. R. Mich. 14 Ges. 3. The court held that where an original was returnable on the Effoign day of term, a declaration could not be delivered de bene effe till the first day of term.

The writ was returnable the fifteenth November, and declaration de bene esse left in the office the 24th, and held

well, two Sundays intervening. 4 Burr. 56.

If declaration is delivered de bene esse, rule to plead may be given before the defendant appears. - But if plaintiff demand a plea before bail filed, this is a waiver of the bail, The plaintiff cannot fign judgment the same day as the de-

mand of the plea made, but may any time next day.

Latitat was returnable twenty-ferond April, being the fecond return, and a declaration was left in the office on the twenty-fourth de bene affe, on the twenty fixth defendant put in special bail, and gave notice thereof; and a rule to plead being entered in the office by the plaintiff's attorney, when that was out he figned judgment without demanding a plea; and held irregular. Et per cur. A plea must be demanded in writing, wherever a rule to plead is given, and the defendant files bail in time, as here he has done : and accordingly judgment was fet afide with cofts. 1 4 iff. 134.

A declaration cannot be delivered in chief before appearance, but only de bene effe. Loft, 333 .- The fame in C. B.

Of delivering Declarations de bene effe.

The plaintiff cannot deliver a decl' de bene effe after the

time for the appearance is out. Pract. Reg. 145.

But the index to yot. 1. Barnes, title Pleading says, the rule that the plaintiff cannot deliver a declaration de bene est after the time for the appearance is out, is altered. 2. only as to not being a waiver of bail?

Planeiff may deliver a deel' de bene effe on a common

writ as well as a special one. Pratt. Reg. 146.

A decl' may be delivered de bene effe on any writ returnable the first or second return of term. Mich. 3 Geo. 2. or third return of term by Trin. 7 Geo. 3.

Notice of filing a decl' de bene effe is not necessary. 2.

Pract. Reg. 149. vide 2 Barnes 185. cont,

If notice is given, no notice need be indorfed on the

decl'. 2 Barnes 185.

Bailable process in C. B. and the declaration was filed in the prothonotaries office de bene esse. Q. If notice necessary to be given of filing declaration.—I his case was agitated Mich. Ir Geo. 3. but not determined, tho' the court inclined that it was necessary, the same as in common process not bailable, vide 3 Wilf. 147.

The delivering a declaration after time for putting in bail is expired, as a decl' de bene esse, is no waiver of the exception to bail; but demanding a plea thereon is a waiver of the exception, because it is admitting the desendant to be in court and in a condition to plead. Trin. 16 & 17 Geo. 2. C. B. Lister v. Wainhouse. 2 Barnes 66.

In an action which requires only a common appearance, if a decl' be delivered de bene esse, the plaintist cannot sign judgment for want of a plea, till the time the desendant had to enter his appearance is expired.— As if the capias is returnable in eight days of St. Hilary, and a decl' is lest in the office de bene esse on the 23d of January; and notice and a rule to plead is given the same day, the rule will be out on the 26th; but as the desendant has eight days to appear, exclusive of the return day, the plaintist cannot sign judgment for want of a plea, till the 29th day of January, and then an appearance must be first entered either by the desendant or the plaintist for him.

Of the Rule to declare.

If the plaintiff does not declare within two terms, he should get a rule for time to declare till the first day of next term; but this rule has no effect by the words of it, if the desendant is actually a * prisoner. — Nor per Cowper, clerk of the rules B. R where the desendant is out on special bail. — But master Benson and the late master Owen were clearly of a different opinion, and so were the secondaries of the court of Common Pleas.

Note, In all cases to make a perfect service of a rule of court, the original rule must be sworn to have been shewn to the party at the time of serving the copy.

^{*} Of declaring, &c. against whom, vide post, title Prisoners.

Of the Rule to declare.

THE fame in the court of Common Pleas.

Of delivering Declarations by the by, or inchief.

If the plaintiff files bail for the defendant, no other per fon but plaintiff can deliver a decl' by the by, but the plaintiff may. Mich. to Geo. 2. — But where dift. has filed

bail himfelf, any one may.

No other person but plaintiff can deliver a decl' by the by, after the term, wherein process is returnable fedente curia: But the plaintiff may declare in as many actions as he thinks fit before the end of the next term after the return of the process. Mich. 10 Geo. 2.

But a decl' by the by, may be delivered at a fuit of a third person before any decl' is delivered by the plaintiff in the

writ. Con. Philips's cafe.

If the ac etiam of the writ be in debt, 2: if the plaintiff can deliver a decl' by the by in case, before he has declared in debt? In B. R. it seems he may, and the only

consequence is, that he thereby discharges the bail.

Where the proceedings are by bill, if a defendant is in court, either by being in actual custody of the marshal, or by a voluntary appearance at any plaintiff's suit,—any other plaintiff is at liberty to deliver a decl' by the by, against him within the same term wherein the writ was returnable. Per master Owen, in the case of Sulyard v. Harris. 4 Bur. 2180.

A writ was returnable East. 7 Geo. 3. at suit of baron and feme, and held that the baron could not deliver a decl' by the by, at the suit of himself only, after the end of that term. — But in the case of Sulyard v. Harris, ante Hil. 8 Geo. 3. a latitat was sued out at the suit of A. and B. against D. who filed common bail, and A. B. declared jointly against him; and then A. delivered another decl' at bis fuit only by the by, and it was held well. 4 Burr. 2180.

Writ general and count as exor, or qui tam or as affignee

of sheriff, good. Stra. 1232.

Of delivering Declarations by the by, or in chief.

O person can deliver a declaration by the by in G. B; but the plaintiff himself, and he must declare within the term the writ is returnable. Prost. Reg. 142.

A deel' by the by cannot regularly be delivered after the term in which the writ was returnable. 2 Barnes 270.

Attar, Pras. 209.

A decl' by the by may be delivered in the same term the write is returnable, the the debt and costs on the first decl' are paid. Pratt. Reg. 144.

On an attachment of privilege de placito debiti, the platutiff cannot deliver a decl' by the by in cafe, till he has de-

clared in debt. Pract. Reg. 141.

In an action at the fait of baron only, he cannot deliver a decl. by the by at the fait of himself & some. Vol. 2. of Rules and Orders K. B. & C. B. 132. I Burnes 245. King's Rep. 204. S. P. But if the writ had been at the fait of husband and wife, he might have delivered a decl' by the by, at the suit of himself. ibid. tho' Pract. Reg. 142. S. G. is cant.

On a capies with an ac etiam at the suit of an executor, the plaintiff cannot deliver a decl' by the by at the suit of him-

felf. MS notes of Pract. 37.

But if the writ had been a general clausum fregit he might have delivered one declaration by the by. ibid. 2. If the writ is general and count as exer. is a variance? Carth. 293. Skin. 386. Sed Stra. 1232. cont. — And in the case of Hamey v. Sparing. G. B. East. 10 Geo. 3. The court held that plaintiff might proceed in his action, but he lost his bail. — So in Lloyd qui tam v. Williams, the writ was a general clausum fregit, and the decl' qui tam, and on argument held well, Mich. 11 Geo. 3. G. B.

Of an Infant's declaring.

If an infant is plaintiff he must declare by prochein ami, or guardian, and the defendant is not compellable to plead until the defendant produces a rule of court admitting him to declare by prochein ami or guardian. Nor need he present a petition to declare, till he hath obtained a rule to declare on his time being out, or to desend till plaintiff hath obtained a rule to plead.

The admission of prochein ami or guardian ought specially to appear upon the record; but it seems in the court of Common Pleas that the admission may be general, and no need of a special separate admission in every particular cause. Vide

I Stra. 304.

A petition to affign an infant a guardian, &c. is in the following form, directed to the chief justice of the court.

In the King's Bench.

Between

A. B. the younger, plaintiff, and C. D. defendant.

To the right honourable William, Earl Mansfield, Lord Chief Justice of England.

THE humble petition of A. B. the younger, an infant, under the age of 21 years, the plaintiff in this cause:

Sheweth, That your petitioner has, as he is advised, a good cause of action against the defendant C. D. for entering into and taking the mesne profits of a messuage or tenement and garden belonging to your petitioner; the possession whereof he has lately recovered against him on an ejectment at his demise; and that your petitioner has lately brought this action against the said C. D. in this honourable court for such entry and taking the said mesne profits, but in regard to your petitioner's infancy:

Your petitioner humbly prayeth your Lordship would be pleased to assign his father J. B. the elder, as and for your petitioner's guardian, to prosecute his said suit or action against the said defendant G. D. and your petitioner shall, &c.

A. B.

Of an Infant's declaring.

The foregoing petition must be figned by the chief justice, for which a see is paid to his clerk; it is then carried, if in the King's Bench, to the elerk of the papers; if in the Common Pleas, to the prothonatory, who enters it and draws up the rule of admission, for entering which and the rule 5s. are paid; and then the judge's clerk files the petition, which is then considered to be of record.

The guardian's confent is as follows:

I do accept and agree to be guardian to the plaintiff A. B. an infant, according to the prayer of the above petition. Witness my hand this day of I. B.

An affidavit of the infant's figning the petition and the guardian's confent must then be made to the following effect:

In the King's Bench.

Between

A. B. the younger, plaintiff, and
C. D. defendant.

L. M. of in gent. maketh oath, That A. B. the younger, an infant, the petitioner in the petition hereunto annexed, named on this present day of did duly sign the petition hereunto annexed in this deponent's presence; and this deponent saith, at the same time he was present and did see I. B. the elder, the person mentioned in the said petition, duly sign the acceptance or agreement there under written, in order to his being a guardian to the said A. B. the younger.

Sworn at, &c. Before, &c.

L. M.

If an infant is defendant, he must defend by guardian, and the same proceedings are had, mutatis mutandis.

If the defendant an infant refuses to name a guardian to appear by, the court on motion, will make a rule, that the plaintiff shall name a guardian for him if he refuses to do it himself. Stone v. Atwell. 2 Stra. 1076.

If there are two executors and one under age they may fue, but cannot be fued by attorney. Stra. 784.

The above petition and confent must be written on a sheet of treble sixpenny stampt paper.

THE plaintiff may amend his declaration after a general isfue pleaded, and before entry in matter of form, without paying costs or giving an imparlance. — But if the amendment is in substance, he must pay costs, or give the defendant an imparlance, at his election. Fine Gibbon. 193. Barnard K. B. 408. 2 Stra. 890. 950.

If the amendment be in substance after a special plea pleaded, the plaintiff must pay costs though he had rather give

an imparlance.

In all cases of amendment after plea, the defendant has liberty to plead de nove, and has two days for that purpose

after the amendment made and payment of costs.

Defendants pleaded three pleas; plaintiff amended his declaration, paid the costs, gave a new rule to plead, and demanded a plea. Whereupon the former pleas were redelivered without a second application to counsel or the court: Plaintiff signed judgment for want of pleas de novo. Per cur. After an amendment of a declaration, desendant has liberty to plead de novo, that is, he may do so if he thinks proper; but he is not obliged to vary his first defence. Rule absolute to set aside the judgment. Barnes 273.

It was ruled, that an amendment shall not be made after that the court cannot help feeing that the matter is upon record [as giving leave to withdraw a demurrer, and plead to iffue after other iffues joined in the same cause have been actually tried and verdicts found with contingent damages] for the whole must be supposed to be still in paper.

Burr. 317.

Deci' was in debt on a bail-bond, and the memorandum in B. R. was of Trinity term, and the affigument in November following. — The plaintiff moved to amend, and on objection made that there was nothing to amend by, the court gave him leave to file a new bill of Mich. term, with a special memorandum; and to amend by the bill filed on payment of costs. Rupell v. Martin. 1 Stra. 583.

If plaintiff moves to amend, it is in the defendant's election to take an imparlance in lieu of costs. This is said to be the practice of the Common Pleas, sed q. in B. R.

2 Stra. 950.

A declaration in ejectment cannot be amended because it is in the nature of process. Stra. 1211. but vide title Ejectment, Vol. 2.

But where in ejectment against two defendants, the declaration was that be entered instead of they entered; and on motion in arrest of judgment, the court at first held it to be bad, but afterwards ordered it to be amended, on the authorities of Cro. Joe. 306. Salk. 48. And plaintiff had judgment. 2 Stra. 807.

Rule to show cause why a declaration in ejectment should not be amended on payment of costs by altering the time of the demise, where the plaintiff would have been barred by a fine from bringing a new ejectment; — and rule to amend made absolute. Doe ex dem. Hardman v. Pilkington & Rus-

fell. 4 Burr. 2446.

A declaration delivered by the by cannot be amended in the name of the plaintiff. — The reason why such amendment cannot be granted is, because there is no writ whereby it can be amended. Poitvin v. Tregeagle. 2 Ld. Raym. 771.

The court cannot amend a writ, [i.e. an original writ]

but if improper or irregular must quash it.

Bill of Middlesex was in debt, and not in trespass, and the court amended it, the on a penal statute. Per Ld. Manssield, the rule is,— that whilst all is in paper you may amend at common law, and in such amendments there is no distinction between civil and criminal prosecutions; but amendment of the record itself by the statutes of amendment extends not to criminal prosecutions. Bondsield qui tam v. Milner. 2 Burr. 1099.— But note, the stat. 8 Hen. 6. c. 12. only exempts appeals and indistinents of treason and selony, and therefore it seems that actions on penal statutes may be amended by this act.

Plaintiffs declared as executors on a promise to their testator, and after issue was joined on a plea of the statute of limitations, they moved to amend by laying the promise to themselves; and it was granted on payment of costs, and leave for defendant to plead de novo. Executors of the

D. of Marlborough v. Widmore. 2 Stra. 890.

Note, If executors declare on a promise to their testator, and issue is joined on the flat. of limitations; a promise to the executors within six years will not maintain the action.— But if executors declare on a promise to their testacr, and issue is joined on the flatute of limitations, if it ap ears that the six years were not elapsed on testator's death, the plaintiffs will have judgment if the

action is commenced within a year after the testator's death.

Bull. Ni. Pri. 150.

In replevin, the plaintiff declared for taking horses in A. in the parish of A. desendant pleaded, that he took the goods in A. in the parish of B. and traversed the taking in A. in the parish of A. and pro retorn. babend. claimed them as a Deodand.—(In motion to amend the declaration, and alledge the place to be in the parish of B. the court granted it on payment of costs, though it was strongly opposed on the notion that it would overturn all pleas in abatement. Garner v. Anderson. I Stra. 11.

Since the above case the court, even in an information for a challenge, where the desendant pleaded in abatement that he was a surgeon, and not a gentleman as stilled in the information — upon debate gave leave, on payment of costs, to amend. The King v. Steward. 2 Stra. 739. 2 Ld. Raym. 1472. — And in the Queen v. The Borough of Malmsbury. The name of the corporation was amended after a plea in

abatement.

In case — one of the defendants was sued by the name of Baronet, and he pleaded in abatement that he was Knight and Baronet. Plaintiff replied that he was Baronet only, and issue was joined thereon; and, on motion to amend, the court denied leave. Lapiere against Sir John Germaine and Dutchess of Norfolk. 2 Ld. Raym. 859.

After a variance pleaded between the writ and count in quare impedit, the court gave plaintiff leave to amend his declaration on payment of costs. Reppington executor v. the governors of Tamworth school, in C. B. 2 Will. 118.

But the court would not suffer a bishop in quare impedit to amend his plea so as to make a new defence, because it is to

take advantage of a forfeiture.

Motion to amend the original writ and declaration in quare impedit, and though urged, if not amended, six months being passed, a lapse would incur; the court denied it. Et per cur. The doctrine of amendment of original writs, which is not by common law, but by statute, 8 Hen. 6. is settled in the books: 1. For nescience or misprission in the clerk.

2. There must be something to amend by. In this case both these requisites are wanting. The court will take care that the suitor shall not suffer by the officer's error. If the missake is the attorney's, the party must seek his remedy against him. We cannot amend it. The writ is agreed.

able to the infructions, and there is nothing to amend by.

A scire facias is not amendable, but must be quashed.

On a common clausum fregit, plaintiff declared against defendant as administrator, and he pleaded that administration was never committed to him; upon which defendant moved to amend his declaration, by making it stand against defendant as executor, and granted on payment of costs. Barnes 5.

An amendment in a declaration, alledging a new right of

action, refused. Sayer 234.

Leave given to strike out 800 l. in case upon promises, after plea pleaded, and to insert 8000 l. every thing being in paper. Havers v. Bannister. 1 Wils. 7.

Title of the declaration amended according to the truth of the fact as to the time of delivering it. Symonds v. Par-

minter and Barrow. I Wilf. 80.

The court will not give leave to amend a declaration after the term next after the term in which it was delivered. 1 Wilf. 149.

But a new count may be added within the next term after the delivery of the declaration, if not alledging a new

right of action.

The plaintiff after plea pleaded, or after the end of the fecond term, shall not add a new count to his declaration (as an indebitatus assumpsit, or the like) under pretence of amending his declaration. Sayer. 97. 151. 172.

The rule is, that plaintiff must apply for leave to add a count within two terms,—because the plaintiff is obliged to declare within two terms, otherwise he will be out of court, and a new count is the same as a declaration. I Wilf. 223.

Leave given to amend the memorandum in B. R. by making it a particular day in term—though the action on a penal

frat. Wyat. qui tam v. Eyland.

Memorandum of a bill not amendable after judgment of responders ousser, a demurrer to it by the desendant for the same cause for which the amendment was asked. Burgess v. Periam. Ld. Raym. 324.

All rules to amend are upon payment of costs. Loft.

The declaration was ordered to be specially entitled on motion of defendant, to enable him to plead a plea of tender. Smith v. Key. Stra. 638.

Leave given to amend the declaration by adding pledges, and memorandum making the declaration agreeable to the

bill on record. Barnes 20.

The teste of an original was amended where it was tested before capias to overreach a plea of tender: but in 2 Ld. Raym. 1066. held, that the teste of an original writ not amendable, and said to be so resolved by the house of lords, with the concurrent opinion of all the judges upon consideration of Gage's case. 5 Co. 45. b.

But a return of a writ may be amended, because that is warranted by the award upon the roll, and therefore being made different from that, it may be amended. Ibid.

And the tefte of a judicial writ is amendable. Yel. 64. be-

cause these are but misprisions of the clerk ..

And a distringus, where a blank was left for the word debiti, was amended by the venire, which was right. 2 Ld.

Ray. 1144.

The title of the declaration was amended by making it of a particular day, viz. the return day of the pluries distringas which was sued out to compel an appearance, and to which the defendant appeared, to let in the defendant to plead a dilatory plea, viz. that Mr. Wilkes was outlawed. Wilkes v.

Earl of Halifax, in C. B. 2 Wilf. 256.

Plaintiffs having occasion to make a long alteration in the declaration, moved to withdraw it, and declare de novo, and obtained a rule which was discharged, being unprecedented. Plaintiffs then obtained a rule why they should not have leave to amend the declaration, putting the amendments in the rule. On shewing cause it appearing that the amendments were not matter of new title, and that the papers were in counsel's hands who died before sinishing the declaration, the rule was made absolute on payment of costs. Barnes 25.

In a qui tam action for usury, the declaration was amended, by altering 100 l. (the sum stated to be lent) into a less sum of 88 l. and this was after the record had been made up, carried down to trial, and withdrawn by the plaintiff.

Mace qui tam v. Lovett. Burr. 4 pt. 2833.

All clerical or other mistakes in a declaration or issue, may be amended by summons before a judge; the order made thereon sometimes gives the defendant an imparlance, and sometimes subjects the party applying to costs.

An order was made by a judge, that the plaintiff should have leave so amend his declaration, in the particulars to the order annexed. Defendants moved to discharge the order upon the face of it for precedent sake. The particulars are the substance of the order, and therefore ought to be inferted in the body of it; and of that opinion was the court; Barnes 15.

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Applications to amend are usually made by fummons before one of the judges.

Df the Menue.

And herein of changing the Venue.

A LL real actions—and mixed actions, as waste, ejectment, &c. are local, and must be laid in that county where the land lies.

Actions of trespass quare clausum fregit must be laid in

the county where the wrong was done.

But transitory actions, as actions of debt, definue, affinult, annuity, account, &c. may be laid in any county where the

plaintiff pleases.

Trespass or Trover for goods—false imprisonment, slander, actions for escape, deceit, or on a false return,—actions against carriers by land or water—on the statute of usury, actions upon the case and covenant, ought to be laid in their proper counties, and not elsewhere. Reg. Mich. 1654. and attornies knowingly laying them out may be severely punished. Ibid.

If the place where a bond or other specialty was made be inscribed in the body of the bond or specialty, the Venue should regularly be laid in that county: but where the place is not mentioned in the body, it may be laid in any

county.

All fuits on penal statutes shall be laid in their proper county, and if, on the general issue pleaded, the offence be not proved in the same county in which it is laid, the defendant shall be found not guilty. 21 Fac. 1. c. 4.

Venue not changeable in an action for fcand. mag. I ev. 56. Vent. 363-4-5. 2 Mod. 215. 2 Jones 192. Carth.

400. Skin. 40. Salk. 668.

Action for fcand mag. was laid in Middlefex, and motion on the common affidavit to change the Venue to Suffex—and Lord Shaftesbury's case cited where the Venue was changed from London into Middlesex.—But per cur. that was by reason of the great influence he had in London—and motion denied. Duke of Norfolk v. Alderton. Carth. 400.

Like motions denied in 2 Str. 807. 2 Ld. Raym. 1418. In Covenant the Venue not changeable. Taylor v. Becket.

Lev. 307.

In an action of escape, it is not of course to change the

Venue. Per Holt. C. J. Salk. 670.

Debt for rent laid in London on a parol demise of lands in Kent, and the court resulted to change the Venue, saying, they never do it in debt. Stra. 878.

Venue cannot be changed if the action be on a specialty.

Venue not changeable in an action for a falle return. Salk.

The court won't change the Venue for a carrier, for the neglect is transitory, and not material where it was. Salk. 670. otherwise perhaps in disceit, or where there is an actual misfeazance. Ibid.

Venue not changeable in an action on the flatute of usury.

Andrews 66.

Action against the sheriffs of London for false imprisonment, and laid in Middlesex, and the Venue was changed into London on the common affidavit, but afterwards it was brought back into Middlefex; it being faid, that the officer of the Compter was subject to the sheriffs, and so there could be no good trial. Salk. 670.

The action was laid in the county of Poole, and for a duty claimed to be due to the corporation. And on motion the Venue was changed to Hampshire, it appearing manifestly there could be no fair trial in Poole. Mayor of Poole v.

Bennet. Stra. 874.

Per cur. in Mylock v. Saladine. 4 Burr. 1564. We are all of opinion, that in transitory actions the court ought to change the Venue, when it appears upon the circumstances laid before them, that there is a probable ground to apprehend that a fair, impartial, or at least a satisfactory trial cannot be had.

Venue laid in London, motion to change it to Salop, on affidavit that the cause of action arose in Denbighshire, and Salop was the next English county. Per cur. It cannot be done without consent; and justice Dennison said, it was denied to him. Mich. 8 Geo. 2. Lloyd v. Williams. Ld. Raym.

A rule to shew cause why Venue should not be changed into Wales, on affidavit of service, was made absolute. 2 Stra. 1270.

The fame point, -Waddington v. Thelwell. 4 Burr.

But it feems, that it is meant thereby that the Venue should be changed into the next English county. Will. 221. Sayer 48.

On motion to change the Venue from Briftol into the adjacent county, the court said, take a rule to try the cause in

the next county, the way is not to change the Venue, but

to try it in the next county. I Will. 77.

Venue not to be changed into a county palatine. Stra. 807. Barnes 488.—But it was changed into Chefler, because the court can send down the record by mittimus. Ld. Raym. 1418. and vide I Wil. 222.

Venue not to be changed into a third county without con-

fent. Stra. 1216,

The court won't change the Venue into either of the three northern counties preceding the Spring circuit, 1 Wilf, 138.

The court won't change the Venue but into a county

where the whole cause of action arose. 1 Wilf. 178.

Venue may not be changed from a county at large, into a city and county. 2 Barnes 388.

But it has been changed from a county at large into the

city of London. Ibid.

And it may be changed from one county and city, into another county and city. Pract. Reg. G. P. 429. But it cannot be changed into Hull, Canterbury, &c. because it is not known when an affize will be held there; nor into the city of Worcester or Gloucester, out of the county at large, because the affizes for the city and county at large are held at the same place. But all this is in the discretion of the court. Barnes 400.

Venue was changed into the next county for want of a fair

trial in the proper county. I Will. 298.

Venue may be changed in B. R. in an action upon a promissory note. Wilf. 173.—but the practice is contrary in C. B. Sayer 7.

Defendant cannot move to change the Venue in any action

until his appearance be entered. East. 24 Car. 2.

In transitory actions, the plaintiff, after the essign day of the subsequent term after the appearance, shall not alter his own Venue, though he would pay costs or give an imparlance. Stra. 211. 858.

The Venue may be changed in local as well as transitory actions, on occasion. Per Earl Mansfield. Loft. 50.

In a transtory action at any time before plea pleaded, on affidavit made, "that the plaintiff's cause of action (if any) arose in the county of A. and not in the county of B. as laid in the declaration, or elsewhere out of the county of A." the defendant may move the court to change the Venue, which the court will do. [Sayer 77.] But if the plaintiff

will undertake to give material evidence of some matter in iffue arising in B, the action shall be there continued. Salk 660.

The defendant must in such case plead to the new action as he should have done to the former without delay; and the Venue may be changed in this manner, though the defendant comes in on the exigent. Mich. 1654. C. B.

Notwithstanding defendant has applied for further time to plead, he may move the court to change the Venue in those cases where the Venue may be changed by the course of the court. Mich. 16 Geo. 2. C. B.— The same practice in B. R.

Venue may be changed after a judge's order for time to plead in B. R. — Sed quære in C. B. vide Sayer. 207.

In Barnes 478. faid it cannot, nor even after a summons before a judge for time to plead, though the summons be discharged and no order made.

But after an order for bail he may. Barnes 483. So after an order for an imparlance. Barnes 487.

But fince the foregoing cases, it has been held in C. B. that a summons, or order for time to plead, shall be no bar to a motion to change the Venue. Barnes 489.

Venue may be changed after a judge's order for taking no-

tice of trial in Middlesex. Wil. 245.

Note, On application to the court to change the Venue, no notice of motion is necessary to be given to the adverse

party, or his attorney.

Where a rule is made to change a Venue, and the plaintiff would bring back the Venue, the rule must be "to give some evidence of the matter in issue arising in that county,"—and where the plaintiff will be bound to give such evidence, the court won't change the Venue.

Where the evidence necessary to support the action arises in two counties, the plaintiff may lay the Venue in which

county he will. Salk. 669.

Where either party suggests special matter for awarding the Venue out of the common course, a copy must be given the other party in reasonable time for them to consider before a Neint dedire is entered. Brocas v. city of London. Stra. 235.

Defendant must move to change the Venue before plea pleaded. So plaintiff must in like manner move to discharge the rule, on undertaking to give material evidence before replication or plea. Quare tamen, as to the plea, for plaintiff may not have time, because the defendant may give a

plea at the same time he serves the rule to change the Venue. Dickenson v. Fisher. Stra. 858.

If a declaration be delivered so early in term, that the defendant has eight days in that term, he cannot move to change the Venue the next term. Applin v. Gray. Str. 211.

The defendants having put in their plea, after a rule for shewing cause why the Venue should not be changed, and before it was made absolute; the court held that the putting in the plea by inadvertency was no waiver of the rule, and gave the desendants leave to withdraw their plea on payment of costs, and made the rule for changing the Venue absolute. Trin. 24 & 25 Geo. 2. G. B. Herbert v. Flower & al. in trover.

Defendant after obtaining a judge's order for time to plead on consenting to rejoin gratis, and taking notice of trial at the fitting after term in London, obtained a rule nisi for changing the Venue from London into Essex, which was discharged, — for though an order for time to plead, is generally no reason against changing the Venue, yet if the defendant's attorney will consent to take notice of trial in the county where the astion is laid, that consent shall bind him. But if the judge had known the defendant's intention of moving to change the Venue, he could have made his order without prejudice to such motion. Trin. 28 Geo. 2. Hunter v. Gray, and Smith v. Gray. Suppl. to Barnes 59, 60.

After the Venue is changed upon the common affidavit, the court will not alter it again upon an affidavit that the witnesses live in Scotland, and will not come so far as London, but are willing to come to Carlisle. Fogoe v. Gale.

B. R. 1 Wilf. 162.

Defendant on motion and common affidavit had obtained a rule to change the Venue from Middlesex to Cumberland; and the plaintiff had altered the iffue accordingly, and delivered the same so altered to the desendant's agent; and then applied for a rule to shew cause why the Venue should not be brought back to Middlesex, which the court discharged, but without costs. — v. Boddington and others. Mich. 20 Geo. 3. B. R.

Rule nist discharged, the words of the affidavit, whereupon the rule was made, being that the action did arise in the county of Bucks and not in the county of Middlesex, or elsewhere out of the county of Bucks, to defendant's knowledge and belief, which is not positive, and therefore insufficient.

Barnes 478.

In C. B. if motion to change the Venue be made the last day of term, the court will not make a rule; for the plaintiff has no time to shew cause. Prast. Reg. 426.

But if the declaration be delivered so late, that the defendant cannot move before the last day of term, he may move it then.

A plaintiff after he has made his election as to laying the

Venue, cannot afterwards change it. Barnes 479.

If the plaintiff is a barrifler, he may lay a transitory action in the county of Middlesex, for his attendance is supposed to be continually in the courts at Westminster. 2 Show. 176. Mod. 64. Styles 460.

And if the defendant is a barrifter, he may have the Venue changed into Middlesex in any transitory action.

Salk. 666.

A ferjeant at law has the like privilege in C. B.

Barristers, &c. are entitled to this privilege, though they have discontinued practice, and have lived in the country

for some years past. 2 Show. 242.

The Venue was changed from Middlesex upon the common affidavit, that the cause of action (if any) arose in Hamp-shire. But on shewing cause that plaintist was a barrister and master in Chancery, the rule was afterwards discharged. Hil. 2 Geo. 2. Burroughs v. Willis. 2 Ld. Raym. 1556. 2 Stra. 822. 1 Wils. 159.

But in C. B. If a ferjeant at law, or an attorney be plaintiff, and fues by capias, and not by writ of privilege, the Venue may be changed, for he has thereby waived his privilege, and is to be confidered only as a common person. Pract. Reg. C. P. 420. Barnes 346. 338. Pract. Reg.

C. P. 419.

If an attorney is plaintiff, and lays the Venue in Middlesex, it shall not be changed, - otherwise if in London. Salk.

668. Barnes 479.

Defendant moved to change the Venue from Middlefex into Suffolk. Plaintiff shewed for cause that he was an attorney of the court, and therefore had a right to lay his action in Middlesex: But it appearing that plaintiff had not declared in person but by N. C. his attorney, the Venue was changed. Barnes 479.

But where an attorney or officer of the court is defendant, he has no privilege concerning the Venue. —— Carth. 126. Show. 148. Barnes 482. —— And even where an attorney was plaintiff the Venue was altered upon affidavit, because

the matter arole, and all the witnesses lived in remote parts

of the kingdom. ibid.

If an attorney fues by Capias instead of attachment of privilege, the Venue may be changed. Barms 480, for he thereby waives his privilege.

An attorney cannot change the Vonne into Middlefex, where

there is another defendant joined. Stra: 610.

A clerk of affize brought an action for affault and battery committed in Kent, and laid the Venue in Middleser, upon the common affidavit the Venue was changed; but on motion for the plaintiff the rule was set aside, and the Venue brought back into Middleser. Knight v. Barnaby. 2 Ld. Raym. 1253. Salk. 670.

Per Powell j. The privilege of laying the Venue in Middlesex, extends to judge's clerks as well as to serjeants at law, barristers, and attornies. Salk. 670. A serjeant sued by original, therefore the Venue on motion was changed.

Barnes 484.

In B. R. where an attorney is defendant, he may change the Venue into Middlesex. Stra. 1049. — But in C. B. it is not alone a sufficient cause to change the Venue. Barnes 144. Prast. Reg. C. P. 419.

But note, Where all such persons sue, or are sued in auter droit, as heirs, executors, or administrators, they lose their privilege.

In cases where the plaintiff cannot regularly move to change the Venue, he may do it in effect by moving to amend; and it was done in this case by striking out Dorsetshire and inserting Middlesex. Stroud v. Tilley. 2 Stra. 1162.

And in the case of Rivett and others v. Cholmondeley, the court suffered this amendment, on the authority of the foregoing case, even after the defendant had changed the Venue

on the usual affidavit. Stra. 1202.

The action was on a remedial law, and by it the plaintiff was confined to bring his action within fix months, and to lay it in Middlefex. By mistake the plaintiff's former attorney laid it in London instead of Middlefex; and the mistake was not discovered till after plea pleaded and issue joined. On which the plaintiff moved for leave to change the Venue from London to Middlefex, which was ordered on payment of costs. If the amendment could not be made, the plaintiff must lose his remedy; he is now too late to bring a new action.

action. In an action upon a penal flatute, the court probably would not interpole; but in the cale of a remedial law, the amendment must be made. Good v. Shone & d.

Plaintiff having laid his action in London with a profert of letters testamentary from the bishop's court in Durham, obtained a rule to shew cause why he should not amend the declaration, by laying the Venue in Northumberland instead of London. On shewing cause the court discharged the rule, it not being usual to amend the Venue at plaintist's instance, unless where the action is confined by act of parliament to a particular county, and plaintist by mistake lays it in another county. Simple contract debts follow the person of the debtor, specialties are assets where found: In this case the amendment seems to be to make good an administration which probably is void in law. Bird exer. v. Foster, Barnes 19.

Of Discontinuing.

Of discontinuing after Declaration delivered and Plea pleaded, or Demurer, &c., and of staying Proceedings after Declaration delivered.

If the plaintiff fees occasion, or finds he cannot support his action, he may discontinue the same either before or after declaration delivered, by motion at the side har, on payment of costs.

If plaintiff would discontinue after joinder in demurrer, it must be moved in court. Frin. 1753. Sanby v. Kirkus.

Vide Barnes 171.

After argument upon a demurrer to desendant's plea, the court refused to let the plaintiff withdraw his demurrer, but gave leave to discontinue on payment of costs. His. 1754. ibid.

Executors and administrators pay costs on discontinuing. 4 Burr. 1451. — 1584. Barnes 169. where they have

knowingly brought their action wrong, - aliter non.

Motion on behalf of plaintiff administrator to discontinue without payment of costs. Action, ejectment, and plaintiff did not discover defendant's title till the record came down to trial; when finding it good against him, declined going to trial. — The motion was granted, on plaintiff's agreeing not to bring another action without leave; but the court said it was not a matter of course, but depended entirely on the transaction being fair, and no lache on part of plaintiff. — Note, this case is the stronger, as plaintiff had undertaken to try the cause peremptorily on judgment being moved against him as in case of a nonsuit for a former delay. Burr. 4 pt. 1928.

Avowant in replevin cannot have a rule to discontinue, for though he is an actor in law, yet it is the plaintiff's suit.

Stra. 112.

Rule for judgment nist, &c. after argument upon a demurrer and joinder to defendant's plea, and motion for leave to discontinue denied. Turner v. Turner. 2 Ld. Raym. 856. Barnes 169.

If plaintiff discontinues, it is always on payment of costs. Action against defendant by a wrong name, to which he pleaded in abatement: Thereupon, without more, the plaintiff declared against him de novo, by his right name;

Of discontinuing after Declaration delivered and Plea pleaded, or Demurrer, &c. and of flaying Proceedings after Declaration delivered.

to which defendant pleaded auter action pendent. On which

In a qui tam action on the statute of usury, the defendant moved to flay proceedings till notice given of the plaintiff's. abode, - On the rule to flew cause being served on plaintiff's attorney, he gave notice that the plaintiff was abroad, but was still going on with the action. After which if was moved a fecond time to flay proceedings till his return, or fecurity given for costs, which is the reason the rule is founded on : And on hearing plaintiff's counsel it was granted, and fecurity was given for the costs accordingly. Vat qui tam v. Green. Stra. 697.

In an action on the case it was moved, on an affidavit that defendant did not know the plaintiff, that the plaintiff's attorney might give an account who his client was, and where he lived. But the court refused it, faying, it had never been done but in a qui tam. Braceby v. Dalton.

Stra. 705.

An attorney of B. R. was ordered to pay costs, where

plaintiff could not be found. Stra. 402.

Infant fued by guardian, and defendant moved that plaintiff's attorney might give notice to him of the place of the guardian's abode, on affidavit that he did not know him, and that he had heard that he was of mean circumstances, granted. Et per cur. It is often done in cases of qui tam, and infants, Tomlin v. Brookes. 1 Wilf. 246.

Of Ponprotting

Of Nonproffing for not declaring.

If the plaintiff does not declare before the ind of the enfuing term after the writ is returnable, and defendants have appeared and filed bail of the term in which the process is returnable; if the fuit is by bill in B. R. a nonpress may be signed without entering any rule to declare or call for a declaration; and the defendant shall have his costs. Stat. 13 Car. 2. B. 2. c. 2. s. 3.

But if the fuit be by original in B. R. the practice is the

fame as in C. B. which is this ---

If plaintiff does not declare after the end of the enfuing term after the writ is returnable, and defendants have appeared and given a rule to declare either at the end of the faid enfuing term, or in 4 days after, and * demanded a declaration by note in writing, the defendant may fign a non-pross at any time in the vacation of such ensuing term, and not after. — Hil. 9 Ann. Mich. 1 Geo. 2. C. B. — Harr. New Pract. B. R. 325. Et per Master Owen.

A nonpross may be figned, tho' the declaration should be tendered after the end of the second term. 12 Med. 217.

A latitat was against five, and one figned a nonpross, and

it was held fufficient for all. ibid.

But it is said that the practice of B. R. is, that if a declaration is delivered after the second term; but before a nonpross is actually signed, you cannot afterwards sign a

nonprofs.

The defendant did not file bail within two terms, and plaintiff did not declare after the end of the second term; but before the third term defendant filed bail and entered a nonpross. On motion to set it aside the court referred it to the Master, who was of opinion, that a nonpross could never be signed unless bail were filed within the two terms. Holmes v. White. K. B. East. 11 Geo. 3.

A latitat was awarded against four defendants, the plaintist was nonsuited by every one of them severally for not declaring against them in two terms; and 30s. costs awarded to every one of them; but it was held ill. — For per Holt, c. j. though the plaintist might declare against them severally, yet as the writ was awarded against them jointly,

In replevin this does not feem necessary. Mich. 1654. f. 16.

Of Nonproffing for not declaring.

and the plaintiff was nonfuited before any declaration, there ought to be but one nonfuit for all of them. Com, 74.

If defendant removes a cause by haben corpus into B, R. he cannot have a compress for want of a declaration. Actor. Praid: 379.

Executors and administrators pay costs upon being nanpross of for want of declaring in due time. 4 Burr. 1584.

So they pay costs for not going to trial pursuant to notice given by them. —— But on a nonfuit they do not pay costs.

Cro. Jac. 229. 4 Burr. 1584.

2. If a prisoner is superseded on filing common bail, if he can ever sign a nonprose? In C. B. plaintist must declare in two terms, Reg. 1654... 15, East. W. & M. f. 3. 14 & 15 Car. 2. Reg. 3. East. 8 Geo. 1. Mr. Cowper clerk of the rules in B. R. doubted whether he might not sign it as soon as bail filed, because the plaintist had not declared within two terms; but that seems impossible. — But Q. If he could not sign it at the end of two terms after bail filed. Vide Prisoners, post Vol. 2.

In assumptit against two on a joint contract, if one pleads bankruptcy, the plaintiss may enter a nonpross as to him, and it don't discharge the other, and that is the proper way of doing in such a case. I Wil. 89. Noke and Chiswell v. Ingham, in error, B. R. — And vide 10 Anne, c. 15. s.

In trespass against several, the plaintiff may enter a nonpress as to one or more and go on against the rest. ibid.

In B.R. the plaintiff's attorney was summoned before a judge to produce his client, — and the judge made an order, that unless he produced him within a month, the defendant should by consent be at liberty to sign a nonpross. He did not produce him within a month, and the nonpross was figned; and on affidavit made that no such man as the plaintiff could be found, the court on motion made a rule upon the attorney to pay the costs; and afterwards, upon an affidavit that they were demanded and unpaid, the court granted an attachment against him. Gynn v. Kirby. Stra. 402.

Motion was made to fet afide a nonpros figned for want of a declaration, which had been demanded of plaintiff's

Of Nonproffing for not declaring.

attorney in the country, and not of the agent in town. It was upon shewing cause sworn, that the plaintist's attorney in the country agreed that the demand on him should be regular. Per cur. Let the nonpers be set aside. No agreement of country attornees can vary the practice of the court. All transactions of this kind must be in town. Barnes 211.

After a nonprofs or nonfuit, the plaintiff may commence another action for the fame early; — but after a retraxit he cannot, — for a retraxit is a total relinquishment of the suit, and a compleat discharge of the action, and is considered as a departure in spite of the court, and used to show that the plaintiff ceases to prosecute his suit for ever. Whereas a nonpros or nonfuit is no bar to another action, but a retraxit is and may be pleaded as such. 1 Wilf. 90.

After a nonprofs to an action wherein defendant was held to special bail, — and a new action brought, the defendant may be held to special bail also. Str. 439. Turton v. Hayes. — But it is the practice in C. B. to discharge on

common bail only.

A nonprofs is in the nature of a final judgment, and is figned in the fame manner by making an incipitur on a double half-crown stamp and roll, which the clerk of the judgments will mark; after which you may immediately tax costs and sue out execution, or bring an action against the plaintiff on the judgment.

An attorney cannot enter a retraxit. Coux v. Lowther,

Ld. Raym. 598. It must be done in propria persona.

Df Imparlance.

IN the King's Bench there can be no Special Imparlance without leave of the court. Eaft. 5 Anne.

If process is not returnable before the third return of

term, defendant is entitled to an Imparlance.

But if process is returnable before the third return of term and declaration is delivered or filed, and notice given before the last four days of term, the defendant is not entitled to an Imparlance. Mich. 5 Anne.

After an Imparlance, whether general or special, semper paratus is no plea, because by craving an Imparlance, it appears he was not semper paratus. Giles v. Hart. Carth. 413.

Df Imparlance.

IN the Common Pleas, if process is not returnable till the fourth or last return of term, defendant is entitled to an Imparlance.

If process is returnable the first, second, or third return of term, and plaintiff declares in London or Middlesex, and the desendant lives within twenty miles of London, he shall plead within four days after declaration delivered. Trin. 8 Geo. 2.

But if plaintiff declares in any other county, or defendant lives above twenty miles from London, the defendant shall plead within eight days after declaration delivered, and no Imparlance. Mich. 3 Geo. 2.

If desendant pleads in abatement in a subsequent term a special Imparlance must be procured within the first four days, which the prothonotary grants of course if the desendant is entitled to an Imparlance. Pract. Reg. 1. 2 Vol. Rules & Orders K. B. & C. B. 78.

If plaintiff amends his declaration and pays costs, defendant shall have no Imparlance. Pract. Reg. 18.

No Imperlance after a peremptory rule to plead. 2 Barnes 181. 208.

Imparlance denied where notice had been ferved, though not indersed on the declaration. 2 Barnes 182-3. 185.

No Imparlance in real actions. 2 Barnes 2.

None in quare impedit after peremptory rule to plead. 2 Barnes 181. Fitzwilliams v. Bp of Hereford and others. Tr. 13 & 14 Geo. 2. the court would not grant an Imparlance, though the declaration was delivered after the Essign day (viz. 4th June) there having been a peremptory rule to plead, after which there can be no Imparlance.

But this argues, if no fuch peremptory rule, the practice would have given an Imparlance, as the declaration was delivered after Essign day of term. But observe this is not in London or Middlesex. Ibid. 185. After rule, M. I Geo. 2. defendant was entitled to Imparlance till Mich. 3 Geo. 2. took it away.

26th April 1763. In a case arising in Middlesex, the writ being returnable the last return of Hilary, and declaration delivered within two days of Easter, a judge made an order for an Imparlance till the first day of next term, and all the secondaries assumed it to be the practice.

And in January 26 1764. On summons, for Imparlance till next term, the writ being returnable the last day of Michaelmas term preceding, and the bail having justified the fecond day of the then Hilary term, and declaration delivered afterwards on that day, the judge ordered Imparlance accordingly, because the plaintiff ought to have delivered a declaration de bene esse before the term. And the next day Mr. Paramour the secondary was asked as to this practice, who was clear that the Imparlance was rightly granted, as plaintiss should have delivered his declaration de bene esse, and given a rule to plead [but not have demanded a plea, for that might waive the exception to the bail] and that declaration de bene esse should have been so delivered before the Essen day of term, for even delivery in such case on the Essen day would have been too late.

Df pleas in Abatement.

When to be pleaded.

O Plea in Abatement can be pleaded after a common imparlance. East. 5 Ann.—And such plea must be pleaded within four days, though a rule to plead is not given. Stra. 1192. 1 Wils. 23. And Sunday is to be counted one of the four days, unless the last. East. 5 Anne.

If the declaration is delivered so late in term, that the desendant is not bound to plead to it that term, he may within the first four days inclusive of next term plead any Plea in Abatement, or to the jurisdiction of the court, as of the preceding term. East. 5 Anne.

No Plea in Abatement after bail-bond forfeited. Salk. 519. The plaintiff may enter a Nil capiat per Billam or Breve after a Plea in Abatement, without paying costs.

A defendant can never have two dilatories.

Note, The courts never will give leave to amend a Plea in Abatement.

Of Pleas in Abatement.

When to be pleaded.

O Plea in Abatement after a general imparlance, without obtaining a special one, which must be within the four days given by the rule to plead. I Barnes 149. 2 vol. Rules and Orders in K. B. & C. B. 63.

Plea in Abatement must be pleaded within the first four days after declaration delivered or lest in the office, though no rule to plead given, unless defendant gets a special imparlance. Att. Prast. 160. Prast. Reg. 286. 2 vol. Rules & Orders, K. B. & C. B. 63.

If the declaration is delivered so late in term, that the defendant is not bound to plead to it that term, he may get a special imparlance and plead in Abatement within the first four days of next term. Prast. Reg. 1. 2 vol. Rules and Orders, K. B. & C. B. 78.

The same in this court.

The same in this court. 1 Barnes 92. 190.

The same in this court.

What Pleas in Abatement require an Affidavit.

BY 4 & 5 Anne c. 16. "No dilatory plea shall be re-"ceived in any court of record, unless the party offering such plea do by affidavit prove the truth thereof, or shew some probable matter to the court to induce them to believe that the fact of such dilatory plea is true."

An affidavit made by attorney is fufficient. Prast.

Reg. 6.

A Plea in Abatement without an affidavit to support the truth of it, is no plea, and the plaintiff may fign judgment instanter, as if no plea had been delivered.

That there is another executor besides defendant. Pract.

Reg. 4. Infancy in defendant. Ibid. 5.

Note, A foreign plea must be signed by counsel, and ingrossed and put in on oath, that is, it must be sworn that it is true, or such plea is not to be received, for thereby the party endeavours to oust the court of jurisdiction. Lil. Reg. 299. Stile. 373. 485. Hetley 126.

And if a foreign plea is not sworn, where it ought to be, the plaintiff may sign judgment by Nil dicit. Stile 225.

Carth. 402. So in C. B.

What Pleas in Abatement do not require an Affidavit.

ANT of addition requires no affidavit, because it appears on the face of the declaration. Prast. Reg. 5.

Cepit in alio loco does not: Nor need it be pleaded in four days. 2 Barnes 281. for it amounts to a plea in bar.

Parol demurrer by an infant does not. 2 Barnes 206.
Ancient demesse does not. Raym. 1418. Sed Pract. Reg.
2. 2 Barnes 151. cont. vide 4 Burr. 1048. Hatch against Cannon in C. B. 10 Geo. 3. held that this plea cannot be pleaded without leave of the court, which must be moved for on affidavit.

Of the Judgment upon a Plea in Abatement.

IF judgment is given for defendant on his plea in abatement and iffue thereon, the judgment is quod, Breve or narratio

caffetur.

If for the plaintiff the judgment is quod responders ousler: But if issue be joined on a fast in a plea in abatement as well as in a plea in bar, the judgment is peremptory quod recupeperet. For whenever a man pleads a fact which he knows to be false, and chuses to put the whole weight of his cause upon such an issue, when he might have pleaded in chief, it is an admittance that he had no other defence; and therefore, if a verdict be against him, the judgment ought to be final, as every man must be presumed to know whether his plea be true or false. Yelv. 112. Vent. 22. 2 Show. 42. pl. 29.

If defendant pleads in abatement, and plaintiff demurs to it, and there be judgment upon the demurrer for plaintiff, there must be a respondens ouster awarded, because every man is not presumed to know the matter of law, which he leaves

to the judgment of the court.

If defendant demurs in abatement the court will give final judgment, because there can be no demurrer in abatement—for if the matter of abatement be dehors, it must be pleaded, if intrinsic the court will take notice ex officio. Salk.

220. pl. 7. 6 Mod. 198.

Defendant pleaded missioner in abatement to an action of assumpsit; plaintiff replied, that he is known as well by one name as the other, and thereupon issue was joined, and verdict for plaintiff; but the jury did not assess the damages.— In such case, the court cannot order a writ of enquiry to assess damages, to supply the omission of the former jury in not assessing them, but a venire facias de novo must go; because no attaint would lie against the jury upon the writ of enquiry, were they to give excessive damages, that being only an inquest of office, whereas an attaint would lie against the jury who tried the issue, if they had given outrageous damages. vide 2 Wils. 367.

So in trespass, if defendant pleads a false plea, and on iffue joined it be found against him, a venire facias de novo must go, because in trespass the whole recovery is in damages, which cannot be assessed but by the jury who passed upon

the principal issue.

Note, The difference in fuch cases is between actions which sound only in damages, and actions where a specific K 4

Of the Judgment upon a Plea in Abatement.

thing is demanded, as debt, &c. for in these, if issue is joined upon a fact in a plea in abatement, and verdict thereon for the plaintist, the judgment is peremptory qued recuperet.

Upon a judgment of responders ousser desendant has four days time to plead, but this is said to be in the discretion of

the court. Comb. 19.

Defendant pleaded in abatement nul tiel person in rerum natura; plaintiff replies, that there is, viz. at Westminster—Demurrer inde and joinder, in which he prays judgment and his damages, which being in chief is wrong, for it ought to be, that he may answer over. Anon, B. R. I Wil. 202.

If a defendant pleads in abatement, and concludes as in bar, that conclusion makes it a plea in bar, and in such case judgment final is given; and not only a responde ous ouster. So when a plea begins in bar, though the matter be in abatement, and it concludes in abatement, yet it is a plea in bar, and thereon judgment final shall be given. Vide Ld. Raym. 1018. and authorities there cited.

Of demanding Conusance.

emendina Candancine

HERE franchises, either by letters patent or prefeription, have a privilege of holding pleas within
their jurisdiction; if the courts at Westminster entrench on their privileges, and they would have the cause
determined before them, they must demand conusance; — for
a desendant cannot plead it to the jurisdiction, because he is
arrested by the King's writ: But where the King's writ doth
not run, the desendant is not legally convened, and therefore may plead it to the jurisdiction. 4 Inst. 224.

As the demand of conusance is made against the general jurisdiction of the King's superior courts, and against the admiration of justice therein, the claim is always nicely looked into, and the superior courts tie them down to the strictest

practice and form imaginable in demanding it.

For the better understanding of this matter, it will be necessary to state the differences between inferior jurisdictions,

which are of three forts :

The first is tenere placita, or a privilege of holding plea, which is the lowest, and is a concurrent jurisdiction; in which case the plaintist may proceed in the inserior court is the will; but that does not deprive the subject of having the cause tried in a superior court of the King's, if he chuses to remove it by certiorari, habeas corpus, &c.

And that for good reason; for, if it were otherwise, a man who comes by chance into an inferior jurisdiction, might be arrested there, and detained in gaol a long time for want of bail.

The fecond fort is conusance of pleas, which is by grant to fome lord of the franchise, and he alone can take advantage of the privilege, for the defendant cannot plead it to the jurisdiction of the fuperior court; but the lord, by his bailiff or attorney, must come in and claim it. And though the lord ought to have it, the fuperior court is not ousled, for the plea remains under the controul of the fuperior court; and day is given upon the roll there to the parties to be in the inferior court at a day certain, and the parties are commanded there, and the tenor of the record is sent for the inferior court to proceed; and if justice is done there, all is well; but the record remains above: — But if justice is not done there, as if the court will not proceed upon the day prefixed, or if the judge misbehaves himself, See, the plaintiff may have a resummons, &c.

The third fort are exempt jurisdictions, as where the King grants to a city, &c. that the inhabitants shall be sued within the city and not elsewhere. Such a grant may be pleaded to the jurisdiction of the superior court, if there is a court there which can hold plea of the cause. No one but the desendant himself can take advantage of this: — And if he is sued there, he may waive his privilege, and remove the cause by certiorari, habeas corpus, &c. Vide Ld. Raym. 836.

Conusance must be claimed in the first instance, or at the

first day the party has. Vide Burr. 4. pt. 2824.

None is bound to claim conusance, until he is intended by law to have some legal notice of his franchise being entrenched upon. ibid.

In order to bar a claim of conusance, some lackes or default in him should be shewn; and that he might have claimed it

fooner after such notice as above. ibid.

Claim of conusance must be entered upon the record, and every thing stated with great exactness and precision that is to take away the jurisdiction, as it may be demurred to, or the facts therein alledged controverted by pleading. 2 Wilf. 409.

Conusance can never be allowed where there would be a

failure of justice. 3 Lev. 149.

Nor can conusance be claimed of any action that was not in

esse at the time of the grant. 14 H. 4. 20.

Conusance won't be allowed, where trespass, &c. is brought against a foreigner who has nothing within the franchise, for they cannot oblige a stranger who has nothing to answer. 22 Ass.

In transitory actions between the scholars of the universities of Oxford and Cambridge, the university shall have conufance; because by their charters, confirmed by act of pardiament, they shall have jurisdiction over the persons of

their scholars.

must be made the first day the party has in court, even upon the return day of the writ, if the cause of action appears therein; if not, then upon the first day given upon the de-

claration. Vide 2 Wilf. 413.

The university of Cambridge claimed conusance, and produced the certificate of the chancellor, that the parties were of the university. And upon a rule to shew cause, it was objected, that the claim ought to be entered upon a roll, and an affidavit to verify the certificate should be produced; and of that opinion was the court, and discharged the rule; and then it was too late to make a new claim. Paternoster v. Gra-

v. Graham. Stra. 810. Vide the case of Foster v. Hexham. 1 Ld. Raym. 427.

The university is not intitled to conusance, unless the defendant be resident in the university; and there must be an affidavit of it.

Conusance may be demanded though the defendant be in

the custody of the marshal. Vide Ld. Raym. 135.

As to claim of conusance, and what is or is not accounted a coming to claim conusance; see the case of the King v. Agar and O'Meara. Burr. 4 pt. 2820. And Ld. Mansfield's opinion therein.

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Of demanding Oper.

I F the action is on a bond, deed, or other specialty, the defendant may demand over, that is, to hear it read to him, and have a copy of it, if he demands it, and cannot be compelled to plead till such time it is given him. — Vide the demand of over opposite.

If a bond is brought into court, over is grantable only the first term, for afterwards it is adjudged in the possession of the party. The same law of a recognizance which is a pocket record. 3 Keb. 76. Downs v. Duckworth. But of other records which are always in court, over is grantable at any time. Vide Ld. Rsym. 84.

When the fuit is by bill in B. R. you cannot have over of the bill: — But when the suit is by original in B. R. the defendant was not bound till late to plead, till over and a copy of the original was given him if demanded. — Rich. Attor. Pract. 2 vol. 229. But per Earl Mansfield, et cur. Mich. 20 Geo. 3. we will never give over of an original writ, as it cannot be prayed but for the purpose of delay.

When the fuit is by bill in B. R. oper may be demanded after imparlance, — but not when by original. Lil. Reg. 267. 6 Mod. 27. 233. 2 Show. 310. pl. 321. Ld. Raym. 970.

After an imparlance, defendant demanded over, upon which the plaintiff demurred. — Per cur. The demurrer is ill, — for the defendant having demanded over, &c. he ought either to have it, or to be ousted of it by the rule of the court: But there cannot be a demurrer upon the demand; he ought to have counterpleaded the demand of the over, and the judgment would have been that he should answer sine auditu, &c. And it was resembled to an uid prier, in which the plaintiff cannot demur, but must counterplead. Mayor and Commonality of London v. Goree. Trin. 27 Car. in B. R. 3 Keb. 491. 2 Lev. 142.

If the plaintiff would contest the giving over to the defendant, he must demur or counterplead the over. Per Holt. Ld. Raym. 970.

Df demanding Dyer.

Latin O and the late to

THE same in this court.

A. B. against C. D. in -

The defendant demands * oyer, and a copy of the writing obligatory mentioned in the declaration in this cause, and the condition thereof thereunder written.

To Mr. I. M. Plaintiff's attorny.

Yours, &c.

The court at this day will not give over of the original writ, - because now the defendant comes into court upon the mesne process as the capias, &c. and there is no original writ issued out at the beginning, as there used to be formerly: Nor would the defendant be at all benefited by craving over at this day of the original writ; - for formerly, when the original writ was spread in the same roll with the count, thereupon if a variance appeared between the writ and count, the defendant might have taken advantage thereof either by motion in arrest of judgment, writ of error, plea in abatement, demurrer, &c. - But the court now hold, that when once a defendant is rectus in curia, there is an end of the mesne process, &c. If he would claim over, it cannot be of the mesne process, but must be of the original writ, and which, as it is not fued out, might be made conformable to the count; and if application in fuch case was made to the Master of the Rolls, he certainly would not refuse to order a right original to be made out. Vide 2 Wilf. 394-5.

Oyer cannot be demanded after imparlance. - Tho' said 2 Lev. 142. and Bro. tit. Oyer. 16. 17. 33. 39. - that it

shall not be after imparlance to another term. .

If oyer is demanded, a true copy throughout must be given, bond, condition and witnesses names, &c. Barnes 263.

^{*} Oyer is given by delivering a copy upon treple penny stamped paper, for which the party delivering is entitled to have 4 d. per theet befides oper.

Oyer must be demanded before the rule to plead is out.

If defendant pleads without craving oyer in a case where he might have had oyer, he shall not have oyer afterwards.

It was settled that if defendant claims over of any thing whereof he is entitled to have over, and it is not delivered in time, he shall have so many days to plead, after the rules are out, as he demanded over before the rules were out. Parnel v. Gay. Stra. 705. Prast. Reg. 301.

If profert is made unnecessarily, over shall not be given.

Salk. 497.

Denial of oyer where it ought to be granted is error, otherwise of granting it where it ought not. Salk. 498.

Ld. Raym. 970.

Where the defendant is party to an indenture himself, he ought not to demand over, but set it forth himself, and if he demands over, and plaintiff gives it imperfectly, it is at the defendant's peril. Salk. 498. and vice versa.

Oyer of a deed cannot be dispensed with, though the plaintiff has lost it. Soresby v. Sparrow. 2 Str. 1186.

Per Holt. Where a record of the same court is pleaded in abatement, and the plaintiff demands over of that record, and it is not given him in convenient time, the plea ought not to be received, but the plaintiff may sign his judgment on rule. Judgment for plaintiff unless over the next day.

Theobold v. Long. Carth. 459. Ld. Ray. 347.

Plea in abatement was—another action depending in this court for the same matter.—Repl. nul tiel record, and prays that the record may be inspected—demurrer inde, and judgment for plaintiff. For being a record of the same court, the plaintiff might pray that it might be inspected, as in Dyer 227. which was the plaintiff's precedent here. Et per cur. Upon this plea the plaintiff might have prayed eyer of the record, and for want of eyer signed judgment, which is the quickest method of proceeding: but final judgment ought not to be signed, but only that he answer ever, for failure of record is not peremptory. Cremer v. Wicket. Ld. Ray. 550.

Debt on bond. Plea, fetting out the condition which was to perform articles, which were, "that the plaintiff shall furnish the defendant with ale and beer to be fold in his Oyer must be demanded before the rule to plead is out. Prast. Reg. 278. 299. — But if defendant has 8 days to plead, he may demand oyer at any time within 8 days, tho' the rule is expired. 2 Barnes 208.

If oyer be demanded after, the plaintiff may fign judg-

ment.

The fame in this court, ruled East. 26 Car. 2. C. B.

If defendant craves over, he shall have as many days to plead after over given, as he had to plead at the time over was demanded. Prast. Reg. C. P. 26. 28. 300. Rep. of Cases of Prast. C. P. 81. Barnes 157. 185.

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If defendant makes a profert and plaintiff demand over, the defendant must give it the day after the demand. Pract. Reg. 301. Rules and Orders C. B. and B. R. 1 vol. 95. 1 Barnes 168.

If the defendant craves over and a copy of the bond, he is entitled to inspect it and have a copy of the whole, with the witnesses names, and all memorandums subscribed and indorsed. 2 Barnes 200.

If the defendant prays oyer, and afterwards delivers a plea without making the oyer part of it, the plaintiff may make up the issue with oyer; for the pleadings are supposed to be ore tenus at the bar, and a record is to be made of what is done there. 2 Barnes 266.

The defendant pleaded a release, with a profert in curia; on the 12th of November, the plaintiff craved over and on the 14th figned judgment, and for want of over being given;

house at such prices, that he should take it of no body else; but might be at liberty to take any other liquors (malt liquors only excepted), and what should not be paid at breaking up the trade, and were undrawn, should be taken back," and then desendant pleaded performance.—Plaintiff replied, That by the same articles it was further agreed, &c. demurrer inde, and joinder, and judgment pro desendant, for the plaintiff cannot alledge new matter in the articles without setting them forth upon oyer. Stra. 227. 2 Saund. 411.

Defendant craved eyer of letters patent, and did not set them out, but pleaded nil debet.—Plaintiffs made up the issue, with the prayer and eyer at the head of the plea, and demanded to be paid for it: upon which desendant moved the court to expunge it.—And the court held, that the desendant, after eyer, was not bound to set out the letters patent; but that if the plaintiffs would avail themselves of the letters patent being set out at large, they ought to do it by praying them to be inrolled at the head of their replication, and ought not to do it at the desendant's expence. Weavers company qui tam v. Forrest. Stra. 1241.

Where the bond, &c. is in the hands of a third person, the court, on motion, will oblige him to give oyer, and produce it. White v. Earl of Montgomery. Stra. 1198.

If defendant pleads a deed, &c. with a profert in curia, plaintiff is entitled to oyer, and a copy, paying 4 d. a theet besides stamps, and shall have as much time to reply after he receives it, as he had at the time of demanding such oyer. Barnard. K. B. 113.

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given; and it was held that this judgment was regularly figned, that from the 12th to the 14th was a reasonable time for the defendant to give the plaintiff oyer, and that the plaintiff had no need to apply to the court to fet afide the plea; for after over craved by the plaintiff; the defendant is bound to verify his plea. Blaxland v. Burgis. Mic. 7 Geo. 2. Prast. Reg. C. P. 301. Barnes 168. Rept. and

Caf. of Prast. C. P 95.
Note, in B. R. the plaintiff in his replication may take advantage of a condition of a deed pleaded, though of another term after the deed pleaded was profert in curiam, becaule his replication runs, " Et prædictus A. dicit, Gc. as of the same term. - But in C. B. he cannot take such advantage in his replication, because in C. B. they enter an imparlance to another term. Bull. Ni. Pri. 253. Therefore in C. B. if plaintiff would take advantage he ought to crave eyer, and then set it forth if he is not party to the deed, if he is, he ought to fet forth himfelf. Vide Wymarke's cafe. 5 Co. 75. and post title " making up the issue".

Defendant had two days time to plead: After which he demanded over of the bail-bond, [the action being by the affignee of a sheriff on a bail-bond] which demand being after the time for pleading expired, the plaintiff looked upon as a nullity, and figned judgment which was held to be

regular. Barnes 326.

Since the term to avoid entering the feveral continuances of business, is reckoned as one continued law day; therefore the deeds pleaded shall be in custody of the law during the whole term, being the day wherein they are pleaded; and being then before the court, any one may take advantage of them; but fince they belong to the custody of the party, if the deed be not denied, it shall go back to the party after the term is over, and then no body can take advantage of it without a new profert. - But where the deed comes in and is denied, it remains in court till the plea is determined, therefore while it is tied up to one court, and is impossible to be removed, it shall be pleaded in another without shewing.

5 Co. 74

Co. Lit. 231. b.

Of pleas in Bar.

Of the general Isfue.

PLEAS in bar are of two forts, — general and special, — the general is a direct negation of the charge in the declaration, and called the general issue. — The forms of which differ according to the nature of the action, as non assumpsit to action of assumpsit, non culp. to action of trespass, &c.

The defendant is to deliver his plea in writing, on a treble penny stamped paper to the plaintiff's attorney; but if his place of abode is unknown, or being known he refuseth to accept it, it may be entred in the general issue book, kept by the clerk of the dockets, for which 6 d. is paid, and 1 s. to the plaintiff's attorney for the entry.

A general iffue need not be figned by counsel, nor more do the following pleas:

Comperuit ad diem to a bail-bond.

Son affault demesne.

Plene administravit by an executor or administrator.

Reins per descent, by an heir.

Nul tiel record.

Per minas.

Solvit ad diem.

Ne unques executor. Infia atatem, which ought to have an affidavit annexed to

verify the truth of it. Pract. Reg. C. P. 5.

All other pleas require a counsel's hand, and all special replications to pleas also.

Df pleas in Bar.

Of the general Isfue.

The defendant is to deliver his plea in writing, on a treble penny stamp paper, to the plaintiff's attorney. Mich. 1654.

And if there be no such attorney to be found, or being found he refuses to accept it, then the plea may be left in the office, — same rule.

A general issue requires not a serjeant's hand; nor more do any of the pleas in the opposite page, except the plea of nul tiel record. Vide 2 Wilf. 74.

All other pleas require a ferjeant's hand; and every replication to a plea figned by a ferjeant ought also to have a ferjeant's hand to it propter dignitatem, for that no attorney or apprentice can answer a ferjeant, or plead any plea in the court of C. P. Simpson v. Neale. 2 Hilf. 74.

L 2

Of paying Money into Court.

HEN the dispute is not whether any thing at all is due to the plaintiff, but only how much is due, the defendant before he pleads is at liberty to move the court for leave to pay so much into court as he really thinks is due to the plaintiff; on which the court makes an order, that the defendant shall have leave to bring into court the sum he moves to pay in. - And upon fuch rule made, if the plaintiff accepts thereof in full discharge, the sum brought in shall be paid out of court to the plaintiff or his attorney, with costs up to that time, to be taxed by the master if in B. R. - or prothonotary in C, B. - But if the plaintiff will not accept thereof, the money shall remain in court, and the amount thereof be struck out of the declaration, and no evidence given thereof upon the trial; and if upon the trial of the iffue between the parties, the plaintiff shall become nonfuit, or the jury shall not asies damages to the plaintiff exceeding the fum to brought into court, then the plaintiff shall have no costs but shall pay to the defendant or his attorney coffs, to be taxed, &c. - But if the jury give more, then the faid fum so paid into court goes towards the satisfaction of the judgment, &c. Payment of money in court by a defendant, is an acknowledgment that he is liable to the action. Burr. 4 pt. 2640.

After the defendant has paid the money into court, he must serve the plaintist's attorney with the rule, and give

him the general iffue.

In B. R. after drawing up the rule for paying money into court, the money is paid to the figner of the writs, who acts as clerk or agent to the fecondary, who by rule of court, E. Jac. 1. is the officer appointed for that purpose.

On paying money into B. R. the officer is entitled to 20s. for every 1001. fo paid in, and so in proportion for every greater or leffer sum; but when under 101. he takes only

2s. and 2s. for the receipt.

When money is paid into court in C. B. it is paid to the prothonotary when the plea is left, who is also entitled to receive 20s. for every 100l. and so in proportion, &c.

Money may be paid into court upon the common rule after rule to plead is out, at any time before plea pleaded.

Barnes 279.

The motion for paying money into court, is a motion of course, signed by a counsel or serjeant, which must be taken to the clerk of the rules in B. R. or prothonotary in C. B. who makes

Of paying Money into Court.

makes out the rule; a copy of which is served upon the plaintiff's attorney with the general iffue.

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en ho es If the term is expired, a judge's order must also be obtained to authorise the rule; which order the judge's clerk makes out of course without your taking out a summons.

If the plaintiff accepts the money brought into court in discharge of the action, he gets an appointment of the master or prothonotary to tax costs on the copy of the rule, wherewith he is served, and serves the desendant therewith; and if after taxation, the desendant does not pay the costs taxed, the plaintiff must proceed in his suit, as if no money had been paid in, for he cannot under the rule, move for an attachment. Stra. 1220.

Money is not allowed to be paid into court after plea pleaded. 1 Wilf. 157.

But after the general issue pleaded, the court of B. R. gave leave to withdraw the same, in order to bring money into court, and replead it. 2 Stra. 1271. 1267. Say. 316.

So in C. B. after general issue pleaded, the court gave leave to withdraw the same, in order to bring money into court and plead the same again, on taking notice of trial for sitting after term, no delay having been occasioned by the defendant's omission to bring money into court before plea pleaded. Phillis v. Barker. Hil. 29 Geo. 2. Suppl. to Barnes 42.

If plaintiff declares against defendant in indebitatus assumpsite on an agreement, and defendant pays money into court, it is an admission of the validity of the agreement, that is, if the declaration is on the agreement only. But if there are other counts in the declaration, as indeb. for money had and received, &c. the defendant may pay money into court on one of these counts, and then such payment into court is not an admission of the validity of the agreement.

Of paying Money into Court; and in what Actions allowed.

I N any action on a policy of assurance, money may be brought into court. Stat. 19 Geo. 2. c. 37. s. 7.

In trover for money, the court gave leave to bring the whole money declared for into court. — But faid they would do it only in this case, and not in trover for goods.

1 Stra. 142.

In an action of debt, money cannot be brought into court. But in debt on bond with a penalty, the defendant may bring the principal, interest and costs, due on such bond, which shall be deemed a satisfaction; and the court may give judgment. Stat. 4 & 5 Anne. c. 16. s. 13.

In debt on the flat. for 51. for killing a hare (with no other count,) the court let the defendant bring in the penalty and costs. Webb, qui tam v. Punter. Stra. 1217.

On ejectment for non payment of rent; — the tenant or affignee may pay into court, all the rent in arrear and costs, and proceedings shall cease. Stat. 4 Geo. 2. c. 28.

After judgment against the casual ejector, and before any writ of possession executed, the court made a rule to stay the proceedings, on payment of all' rent and costs. Stra. 900.

In ejectment by the mortgagee, the mortgagor may bring into court the principal, interest and costs, and proceedings on

rule will be staid. Strange 413.

Rule to pay money into court, and have it struck out of the declaration, upon payment of costs, in an action upon the case for the use and occupation of an house, was discharged as to the costs, but made absolute as to the paying the money, the plaintiff's action appearing to be brought and kept on foot very oppressively. Burr. Rep. 578.

In covenant you cannot pay money into court, except

where it is for rent or payment of money certain.

In special action on the case for damages done to a chaise let to hire by immoderately driving, money was not allowed

to be paid into court. Stra. 787.

In an action for dilapidations, the court refused to let the defendant bring money into court, and said it was like trespass, where you cannot do it, though you may tender amends. Squire v. Archer. Stra. 906.

Of paying Money into Court; and in what Actions allowed.

THE same in this court.

In trover, goods not being ponderous have been allowed to be brought into court.—But this is discretionary, and where they have been ponderous, the plaintiff has been ordered to shew cause why he should not accept them. Barnes 200. Prast. Reg. G. P. 260. Rep. and Cas. of Prast. C. P. 120.

The same in this court.

In debt for rent money may be brought into court. Barnes 198. Pract. Reg. C. P. 257.

In replevim and avowry for rent the plaintiff was allowed to bring money into court. Rich. Att. Pract. C. P. 137.

The fame in this court.

The fame in this court.

The fame in this court.

In debt for the penalty of a charter party, motion denied to bring money into court. Yeoman v. Ross. 2 Barnes 231.

In debt on bond conditioned for good behaviour and payment of money, motion for leave to bring in the money and plead performance to the rest of the condition, denied. Atkins v. Taylor. 2 Barnes 231.

In debt on bond conditioned for the performance of covenants in a lease, and breach affigned for non-payment of 10 l. for half a year's rent; the like motion denied. Wright v. Bennington. 2 Barnes 23?

In an action for mesne prosits after recovery in ejectment, the desendant cannot pay money into court. 2 Wil. 115.

In covenant where the breach was affigned in a fum certain, viz. 11 l. for not dreffing corn, leave was given to bring in the money on the common rule. Walmouth v. Houghton. 2 Barnes 229.

L 4

Of Paying Money into Court and in what Cases allowed.

Ondition of a bond was to pay 40 l. by 5 l. per annum, and the defendant had leave to bring in the arrears of the 5 l. per annum into court, on the flat. 4 & 5 Anne. Brid-

ges v. Williamfon. Stra. 814.

Debt on bond conditioned for payment of money by inflatments, and the court gave leave for defendant to bring the money due by that instalment into court, but not to stay plaintiff from figning his judgment for the penalty incurred by non-payment of the instalment. - But though the plaintiff in such case may sign his judgment, the court won't let him take out execution until the payments become due. Darby v. Wilkins. Stra. 957.

Cannot bring money into court in an action for injuring

Nor in action of account. Anon.

If the plaintiff proceeds in the action, after he has taken the money (paid into court) out of court, though he difcontinues he shall not have costs, even up to the time of bringing the money into court. Say. 196.

Money may be brought into court at the fuit of executors and administrators. Stra. 796. And if they proceed for more and do not recover, they lofe their cofts.

The court will not give the defendant liberty to bring money into court on some of the counts in the declaration, and demur to the rest, - for the reason of making the rule for bringing money into court, is to prevent vexation, and make an end of the cause.

On shewing cause why the defendants should not pay 2670 l. into court on two of the breaches assigned in an action of covenant on a charter-party (viz. for freight and demorage) and the same be struck out of the declaration. Lord Mansfield observed, that in motions of this kind, where the defendant applies to pay money into court, and to have the demand thereupon struck out of the declaration,

Of paying Money into Court, and in what Cafes allowed.

On the common rule 37 l. being paid into court, the plaintiff proceeded to trial, and recovered a greater fum, and afterwards became a bankrupt; the offignees moved to have the 37 l. paid to them; but the plaintiff's attorney infifting that as he had been the means of obtaining the verdict, he ought first to be paid his bill of costs—and the court ordered that his bill should be taxed, and what was due to him should be paid out of the money, and the residue to the assignees. Owssor v. Obrien. Suppl. to Barnes 11.

5 1. or under may be brought in on motion in the Trea-

fury.

Where the plaintiff has refused the money and proceeded, the court has admitted him to take the money out of court on paying the defendant his costs incurred subsequent to the bringing the money into court. Rich. Att. Pract. C. B.

The same in this court: but it should be distinguished in the rule, that the plaintiff sues in the capacity of executor

or administrator. Barnes 280.

Leave granted to bring money in on the common rule, and plead plene administravit, and the general issue to the whole. Austin v. Ross executor. 2 Barnes 234.

The same in this court. Pract. Reg. C. B. 256.

But the court gave leave to bring 5 l. 5 s. into court on the common rule, with respect to the 7th and 8th counts, there being nine counts in the declaration, and as to the rest to plead the general issue, statute of limitation and a set-off. Hellier v. Hallett, administratrix. 2 Barnes 23.

So leave given to plead bankruptcy to one count, and bring the money in on the common rule, and plead the general issue to the other counts. Hall v. Lane. 2 Barnes 276.

If a regular judgment be set aside on payment of costs, pleading an issuable plea, &c. the defendant shall not have leave to bring money into court. Barnes 198. Pract. Reg. C. P. 82. 262.

The defendant had brought money into court on the common rule; the plaintiff would not accept the fame, but proceeded to trial, and was nonfuited: Upon which defendant moved Of paying Money into Court, and in what Cases allowed.

the law arises upon the fact, and the true and sensible distinction is, "That where the sum demanded is a sum certain, or capable of being ascertained by mere computation, without leaving any other sort of discretion to be exercised by the jury, it is right and reasonable to admit the desendant to pay money into court, and have so much of the plaintist's demand upon him struck out of the declaration, and that if plaintist will not accept it, he shall proceed at his peril. Hallet v. E. I. Company. Burr. 4 pt. 1120.

Of paying Money into Court, and in what Cases allowed.

moved in the Treasury, that in regard as the plaintiff was out of court by the nonsuit, he might have the money back, and produced the postea. And the judges, on consideration, were of opinion, that the defendant, by bringing the money into court, had admitted the plaintiff to be entitled to it at all events, and that therefore the defendant could not have the money again. Afterwards the plaintiff brought a new action, and the court made a rule that the plaintiff might have that money if he thought fit;—but if not, that it should remain in court on the common rule in the new action. Lane v. Wilkinson. Pract. Reg. C. P. 250. Rep. & Cas. of Pract. C. P. 36.

The like resolution was made as above, and leave for the defendant to bring more money into court, on a new action

being brought. Pratt. Reg. C. P. 252.

Motion was made upon an affidavit that defendant was dead, that 10 l. formerly paid into court upon the common rule might be paid out to his executors. Denied. Barnes 279. 281.

Money was paid into court. Plaintiff proceeded and recovered a less sum. Motion that defendant might have the money out of court towards his costs, and granted. Barnes

280.

After regular judgment signed, though set aside, desendant cannot have leave to bring money into court. Barnes 281. 285.

If defendant has paid a fum into court, and iffue is joined, the court will not afterwards give him leave to pay

more into court. Barnes 282.

Judgment was arrested, and consequently no costs on either side. But the court ordered money which had been brought into court to be paid to the plaintiff. Fisher v. Kitchingham. Barnes 284.

Of the Plea of Tender.

N a plea of tender of money, the defendant must pay the same into court to the proper officer for receiving it, who gives a receipt for the same in the margin of the draft of the plea, which is copied on that filed with the elerk of the papers or prothonotary; but no rule is drawn up

to pay the money into court.

A plea of tender ought regularly to be pleaded in the same manner as a plea in abatement; viz. in 4 days after the declaration delivered, if delivered 4 days before the end of the term; and if delivered before the Essign-day of a term, then it must be delivered within the 4 days of that term, as a plea of the last term. Carth. 413. Salk. 622. Ld. Raym.

254. Say. 18. 2 Barnes 284.

But the strictness of this rule is to be dispensed with in particular cases, as if the defendant lives at a great distance in the country, so that his attorney cannot deliver the plea in due time; the court will upon such reasonable cause give further time to plead a tender, as of the term in which the declaration was delivered; but such application should be within the 4 days, or at least as soon as it possibly can be, without any delay on the part of the desendant.

A rule was made absolute, giving defendant leave to plead a tender of the last term, notwithstanding the general imparlance. The desendant's agent, though he appeared in time, having had no notice of the declaration till the first

day of this term. Barnes 353.

In B. R. a special memorandum was ordered, where by a general one the defendant was ousted of his plea of tender.

Stra. 638.

If a tender be pleaded with a toutjour prist, and the money brought into court, in case the plaintiff would go for surther damages he must not take the money out of court, but take issue on the tender, or reply a request and resusal; and if such issue is sound against him he will be barred of his action: But if he take the money tendered out of court, judgment is given for the desendant to go quit. Cliff v. Jones. Tr. 5 Geo. 1. C. B. Ld. Raym. 774.

In covenant the damages, and not the debt being the thing in demand, there is no necessity of pleading tender and re-

fusal with an uncore prist. 1 Show. 130.

In trespass quare clausum fregit, plaintiff may plead a tender of sufficient amends before the action brought. 21 J. 1. c. 16.

Of the Plea of Tender.

But tender of amends cannot be pleaded to a voluntary

trefpafs. 1 Stra. 549. Ld. Raym. 255.

To an averwry for damage feasant in replevin, tender must be pleaded to have been made before impounding, for it is not within the stat. of James 1. which goes only to trespass, where tender of amends may be pleaded to have been made at

any time before action brought. Lutw. 1596.

If a man avow taking the cattle damage feasant, and the plaintiff pleads tender of amends and a refusal, he shall recover on a verdict for him damages for the detaining and not for the taking, because the taking was lawful. — But if the tender were before the taking, the taking is tortious; if after impounding, neither the taking nor detaining is tortious. And after the avowant has had return irreplevisable, yet if the plaintiff make sufficient tender, he may have detinue for the detainer after. Salk. 584. 8 Co. 147. Bull. Ni. Pri. 60.

To an avowry for rent, the plaintiff may plead a tender and refusal, without bringing the money into court, because if the distress were not rightfully taken, the defendant must an-

fwer the plaintiff his damages. Bull. Ni. Pri. 60.

But if the distress were rightfully taken, the plaintiff cannot plead tender of rent and costs, in bar of an avowry for rent in any case, unless the distress was made of corn, grass, &c. growing on the premisses; and then such plea is given by 11 Geo. 2. c. 19. s. 9.

On a plea of tender, if the money is not paid into court the plaintiff may fign judgment. Pether & al' v. Shelton.

I Stra. 638.

A tender is pleadable to a quantum meruit, settled on demurrer. Salk. 622. 1 Stra. 576. Tho' per Holt, C. J. not. Ld. Raym. 255.

A plea of tender is an issuable plea within a judge's order. Burr. 4 pt. 50. i.e. in B. R. though not in G. B. Rep. and

Caf. of Pract. C. B. 134.

In assumpsit formerly a tender used to be pleaded to a particular count, if there were more than one in the declaration; but on demurrer to a plea of tender generally to the whole declaration, it was ruled, Trin. 19 Geo. 3. B. R. that such plea was good.

Money brought into court on a plea of tender cannot be taken out by the defendant, though he has a verdict. Stra.

1027.

Though

Of the Plea of Tender.

Though a tender is made, and the plaintiff refuses the money, yet the tender cannot be pleaded in bar of the action, either in debt or offumpsit, but in bar of the damages only, for the debtor shall nevertheless pay his debt. 1.d. Raym. 254.

In debt on bond conditioned to pay a sum certain, a tender

may be pleaded after imparlance. ibid.

The 24 Geo. 2. c. 44. Impowers justices within a month after notice given of an action intended to be brought against them for any thing done in the execution of their office, to tender the plaintiff amends; and in case it is not accepted, to plead the same in bar with the general issue and other pleas, with the leave of the court; and if upon trial the jury shall find the amends to have been sufficient, then verdict shall pass for the defendant; — or if plaintiff become nonsuit, discontinue, or judgment be given against him upon demurrer, he shall pay costs, &c.

In C. B. Mich. 11 Geo. 3. the court refused to give leave to plead non assumpsit to all the premises, and a tender, as the practice is, to pleader the tender as to part, and non assumpsit to all the rest. Downal v. Bowman. 3 Wils. 145. Sed

vide supra, the case in B. R. Trin. 19 Geo. 3.

After a plea of tender, and money brought into court, the court will not admit the defendant to withdraw his plea and plead the general iffue. Barnes 235.

By the 2 Geo. 2. c. 22. "Where there are mutual debts between plaintiff and defendant, or if either fue or be fued as executor or administrator, where there are mutual debts between testator or intestate and the other party, one debt may be set against the other; and such matters may be given in evidence on the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt is to be insisted upon in evidence, notice be given of the particular sum or debt so intended to be insisted on, and upon what account it became due."

And by 8 Geo. 2. c. 24. "Mutual debts may be fet against each other, notwithstanding they are of a different nature, unless where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty; and in all such cases, the debt intended to be set off shall be pleaded in bar, in which shall be shewn how much is truly and justly due on either side; and in case plaintiff shall recover, judgment shall be entred for no more than shall appear to be due after one debt set against another."

Where the debt is of an equal sum, there the action is barred; but if it be for a less sum than for what the action is brought, the desendant must pray to have it set off. Bull. Ni. Pri. 179.

Where a mutual debt is of equal fum with the plaintiff's demand, it is to be pleaded in bar to his action.

Where defendant's demand exceeds the plaintiff's, it must be given in evidence upon the general issue, and notice of sett-off.

But where the defendant's demand does not countervail plaintiff's, he should move the court wherein the action is depending for leave to pay so much money into court, as with his own demand will be sufficient to satisfy the plaintiffs.

Defendant pleaded the general issue, but forgot to give notice at the same time of a sett-off; and upon motion in time the court gave leave to withdraw the plea, in order to deliver it again with a notice of sett-off. 2 Stra. 1267. Say. Rep. 316.

^{*} The general issue in the act means any general issue. Bull. Ni. Pri, 181.

A notice of fett-off was as follows:

"Take notice, that you are indebted to me for the use and occupation of an house for a long time held and enjoyed, and now lately elapsed." - Per Ld. Hardwicke C. J. These notices should be almost as certain as declarations, the legislature designed them to be in the nature of cross actions, and they should be expressed with great certainty, that the plaintiff might be able to make a proper defence to them. Had this been a declaration for use and occupation, is had certainly been bad, for it must have shewn the commencement and determination of it. Afterwards it appeared, that the debt designed to have been sett off was for rent referved on lease by indenture; which not being mentioned in the notice, the chief justice said, it was bad on that account allo; for if this had been thewn, the plaintiff might probably have proved an eviction, or some other matter to have avoided the demand. Fowler v. Jones, fittings at Westminfter. Hil. 8 Geo. 2.

A debt due to a man in right of his wife cannot be fett off in an action against him on his own bond. Paynter v. Wal-

ker. C. B. Eaft. 4 Geo. 3.

In debt on bond, the defendant craved over of the condition, which was to pay the plaintiff 10 l. per annum during life; and then pleaded, that the plaintiff was indebted to him for 500 l. for money lent, &c. exceeding the yearly fums that had incurred for the annuity, and offered to fett off as much, &c. and on demurrer the plea was holden good. Collins v. Collins. Tr. 32 Geo. 2. Bull. Ni. Pri. 179.

A fett-off reducing the plaintiff's demand under 40 s. does not affect the jurisdiction of the juperior courts. Pitts v. Carpenter. 1 Wilf. 19. Str. 1191. 2 Wilf. 68. 3 Wilf. 48.

To affumpfit for a o'l. lent, &c. Defendant pleaded articles of agreement with mutual covenants in a penalty of 2001, for performance, and shewed a breach whereby the penalty became due, and offered to fett off. — On demurrer the court held this plea not within the statutes, for there may not be 51. justly due to the defendant on the balance. Nedriff v. Hogan. E. 33 Geo. 2. Bull. Ni. Pri. 180.

A debt barred by the flat. of limitations cannot be fet off if it be pleaded in bar to the action, the plaintiff may reply the flat. And if given in evidence at the trial on a notice of fett-off, it may be objected to. Bull. Ni. Pri. 180.

Plaintiffs

Plaintiffs were assignees and brought an action for goods sold by them to the defendant. He sett aff a bond due from the bankrupt to him, and on demurrer it was holden that the statutes for setting off mutual debts, do not extend to assignees of bankrupts; and that these can never be considered as mutual debts; for where there are mutual debts there must be mutual remedies, which is not the case here. Ryal & al' assignees v. Larkin. 1 Wils. 155.

In replevin the avowant justified under a distress for rent, and the plaintist at the trial insisted, that there was more due to him than the rent amounted to. — And Denison J. refused the evidence, and on motion for a new trial, the court held that the statutes did not extend to the case of a distress, for that is not an action, but a remedy without suit: they likewise declared, that they do not extend to detinue, and the like actions of wrong.

In debt on bond, defendant pleaded a greater debt in bar, upon which the plaintiff prayed to have the condition of his bond enrolled, which was to appear at Westminster, and demurred; and it was holden that this bond was not within the 8 Geo. 2, for that statute relates only to bonds conditioned to pay money, and not to bail-bonds: And it was not within the stat. 2 Geo. 2. because the plaintiss did not bring the action in his own right, but as trustee for another (for he was an officer in the palace court); but if it had been given to the sheriss, and by him assigned to the party, it might be otherwise, and then the penalty would have been considered as a debt, because it would have depended upon the 2 Geo. 2.

Covenant on an indenture for nonpayment of rent. Plea non est factum, and notice of sett-off upon covenants in the same deed for money due to defendant. Question was upon this plea, whether desendant could give in evidence his demand? The judge at the trial thought not: For desendant it was said, the debt was mutual, of the same degree, and arising on the same contract; and, that the plea was a general issue within the act. For plaintist, that the desendant's plea was inconsistent, as he denies the deed, and at the same time makes a demand under it. He might have pleaded the general issue without denying the deed, or might have pleade

ed specially. Cur. adv. Barnes 290.

The form of a notice of Sett-off.

Plea general iffue.

Mr. I. M.

TAKE notice, that the faid defendant C. D. intends to give in evidence at the trial of this cause, and insist that the faid plaintiff A. B. was before and at the time of exhibiting his bill against the said defendant, and still is indebted to the said defendant in more money than is due to the said plaintiff by reason of the premises and undertakings in the declaration mentioned, to wit, at

aforesaid in the said county, in the sum of 401. for fo much money before that time lent and advanced by the faid C. D. to the faid A. B. at his special instance and request: And in the further sum of 40% for so much money before that time paid, laid out, and expended to and for the use of the said A. B. at his like special instance and request: Which faid sums of money, or so much thereof as will be fufficient to answer and satisfy such demands as the faid plaintiff A. B. shall be able to prove against the faid defendant C. D. by reason of the promises and undertakings in the faid declaration mentioned, at the trial of this cause, the said C. D. will give in evidence, fett off and deduct against such demands of the faid plaintiff, according to the form of the statute in fuch case made and provided.

Dated, &c. To Mr. I. M. Plains. attor. Yours, &c.
O. P. defends, attor.

The above notice must be written underneath the plea, on the same sheet of treble penny: A copy of which must be kept by the desendant's attorney, it being necessary to prove a delivery thereof, on the trial of the cause.

Of an Infant's defending.

A N infant must defend by guardian if he is sued, and he cannot regularly plead by guardian until admitted so to do by some judge of the court. If he should it is only a misdemeanor in the attorney, but not error: but if he appears by attorney it is error. Vide the rule, &c. ante, under the title, "Of an infant's declaring."

Where the defendant is an infant, the plaintiff ought to apply to him to name his guardian in 6 days; and in default thereof the plaintiff must apply to the court to oblige him to name his guardian; and upon such application the court will order him to name one in 4 or 6 days.

If plaintiff has proceeded in his cause till issue, &c. upon defendant's appearance by attorney, not knowing that the defendant was an infant, and then discovers it, he should move for a rule to shew cause why the appearance in the filazer's or judge's book should not be struck out, and defendant be obliged to appear by guardian, and why the record should not be made conformable to it.

The plaintiff may have a fummons for an infant to shew cause why he should not name a guardian to defend a suit.

An attorney undertook to appear for the defendant an infant, and entered it by mistake per attornatum, per cur.—
It may be amended and made per guardianum, for he is bound to appear in a proper manner. Stratton v. Burgis.

1 Stra. 114.

Plaintiff appeared for defendant as a person of full age by assiduant pursuant to the statute, and proceeded to judgment: And desendant brought a writ of error, and it was disclosed, that he intended to assign nonage for error in sact. On which plaintiff moved to strike out the appearance in person, and enter an appearance by guardian for desendant, if he did not appear and do it himself; but the court denied it, thinking the plaintist's application too late. Barnes 413.

164

When defendant ought to plead.

N all process returnable the first or second [i. e. before the third] return of term, if plaintiff declares in London or Middlesex, and the defendant lives within 20 miles of London, the declaration may be delivered with notice to plead within four days after delivery, and defendant shall plead within that time - and if plaintiff declares in any other county or defendant lives above 20 miles from London, the declaration may be delivered with notice to plead within eight days after, and if defendant does not plead in that time, a rule to plead having been given and expired, and a demand in writing of a plea having been made, the plaintiff may fign judgment. Tr. 5 & 6 Geo. 2.

If the process is bailable, the declaration may be delivered de bene esse with like notice to plead respectively as above : but in all cases where the process does not require bail, and the declaration is delivered de bene esse, it must be with notice to plead in eight days after delivery; and if defendant does not file common bail, and plead within the eight days, (a rule to plead having been given, &c.) the plaintiff may fign judgment, and a demand of a plea is not necessary where the declaration is delivered de bene esse. Mich. 10 Geo. 2.

But in all these cases the declaration must be delivered, at least four days before the end of the term, exclusive of the day of the delivery, otherwise the defendant will be entitled to an imparlance. Att. Pract. K. B. 127. and note on Reg. Tr. 5 & 6 Geo. 2.

Where bail is filed by the defendant, there must be a plea demanded in writing, although notice to plead be upon the declaration. I Wil. 134.

If four terms are elapsed after declaration delivered, the defendant shall have a whole term's notice to plead before judgment can be entered against him, unless the cause has been stayed by injunction. Rich. Att. Pract. B. R. 226.

If a defendant is bound by a rule or order of court, to plead by a time therein limited, it is incumbent on him to plead by fuch time, although the plaintiff does not enter any rule to plead or call for a plea. Att. Pract. B. R. 231.

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When defendant ought to plead.

HE same rule in this court. Mich. 3 Geo. 2. But the day of delivery is inclusive.

And the same practice on all process returnable the third return of term. Tr. 7 Geo. 3.

But a declaration must be delivered four days before the end of term, exclusive of the day of delivery to have a plea of that term. Att. Pract. 114.

So that where the process is returnable on the third return of any term except Easter, the declaration must be delivered de bene effe to have a plea of the term, else there will not be

The same in this court on process returnable the first or fecond return of term. Mich. 1 Geo. 2. Mich. 3 Geo. 2. & East. 3 Geo. 2. And also on process returnable the third return by I & 7 Geo. 3.

If bail is filed by the defendant, the plaintiff's attorney, before he can fign judgment, must, by note in writing, demand a plea of the defendant's attorney. Mich. 1 Geo. 2.

Where a rule to plead has been given, and the defendant obtains an order for time to plead till the first day of the next term, the plaintiff may fign judgment on default of defendant's pleading, without giving a new rule. Rep. & Caf. of Pract. C. P. 67. 141.

Where the plaintiff has given a rule to plead, and has been delayed from figning judgment by an injunction out of Chancery, after the injunction is dissolved he may fign judg-

ment without giving a new rule. Barnes 157.

When defendant ought to plead.

A plea delivered to the attorney in the country is irregular, the delivery ought to be to the agent in town, or else left in the office.—The same in C. B. Rich. Att. Pract. C. P. 159.

The plaintiff cannot fign judgment for want of a plea till the afternoon of the day after the rule to plead is out.

-The same in C. B. Ibid. 161.

If the defendant does not plead according to the rules of the court, so that the plaintiff may enter judgment upon a nil dicit; yet if, after the rules are out, the defendant do put in his plea, before the plaintiff hath entered his judgment, this plea is to be accepted, and the plaintiff ought not then to enter his judgment; and if he doth, such judgment may be set aside for irregularity. Lil. Reg. 298.

9. Suppl. to 2 Barnes 39.

Of procuring longer Time to plead; and herein herein of Summonses, Orders, &c.

A Judge of the court on application to him at Chambers for time to plead will make an order accordingly.

If a judge gives an order for a month's time to plead to defendant, it is a lunar month, or four weeks *. Tullet v. Linfield. 4 Burr. 1455.

The length of time given to a defendant to plead is entirely in the discretion of the judge; and such order is usually granted upon terms, so as not to delay the plaintiff.

If in a town cause [that is a cause which is to be tried at the sittings in London or Westminster] the desendant applies either for time to put in, add, perfect, or justify bail, or plead, the judge will not grant any orders but upon condition that his attorney undertakes to plead an issuable plea, and pleading issuably, within the order, means pleading such an issue, as the plaintiff might go to trial upon. 4 Burr. 782. Therefore a plea in abatement, is not such a plea, because it tends to delay the plaintiff. Ibid.

But a plea of tender, is in B. R. ibid. but not in C. B.

Rept. & Caf. of Pract. C. P. 134.

So to an action on a bail-bond, a plea of the Stat. 23 Hen. 6. c. 10. that the bond was taken for ease and favour, is an issuable plea within such order. Burr. 605.

A general performance is not an iffuable plea within a

judge's order in an action of covenant. Barnes 354.

Where the cause of action is local, and cannot be tried but at the affizes; the length of time to be granted will depend entirely on the interval there is between the application, and the commission day of the circuit; for the judge will not extend his order so far as to hinder plaintist from trying his cause at the then next affizes, if he chuses it.

If either of the parties lives in the country, and the cause of action is transitory, the same doctrine is held as in town

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^{*} In all legal proceedings a month means four weeks, except in quare impedit, where fix months means calendar months; but that is because it is manifest from the words of the statute 13 Edw. 1.

6. 5. or Westminster 2d. that by fix months, half a year is there meant. The words are, "If he recovers his presentation within fix months, damages shall be given to half a year only." So that there is this distinction between temporal and ecclesiastical law, in interpreting the word month; the former understands it to be lunar, the latter calendar.

Of procuring longer Time to plead; and here in of Summonses, Orders, &c.

causes; allowing for the difference of time required in no-

tices, in order to join iffue in them.

If the defendant presumes, in breach of his undertaking to plead a dilatory plea, or such an one as plaintiff cannot argue the law, or try the fact on, the plaintiff may sign judgment, as if no plea had been pleaded, and give notice

of executing a writ of enquiry.

The terms usually contained in a judge's order, on summons for time to put in, add, perfect, or justify bail, or for time to plead, are these; "Pleading issuably, rejoining gratis, taking short notice of trial, or inquiry (if necessary) within the term:—But the judge will not hold the desendant to all these terms and conditions, on granting the strss order, unless the state of the cause require it, or the party summoned before him, ask it, for the desendant's not making application sooner; and shews that such neglect was owing to his own wilful laches.

In case the desendant has had an order, not under all the said terms; further time, on taking out a summons for the other party to attend, may be allowed on condition that the plaintiff is not prevented from trying his cause in the term of which the writ is returnable; provided the plaintiff had an opportunity of going to trial, had the desendant ob-

tained no time at all.

The court of C. B. held a demurrer not to be an issuable rejoinder within the judge's order. Nesbet v. Farmer. Barnes

1t.8.

The defendant having obtained a judge's order upon the terms amongst others of pleading an issuable plea, put in a sham demurrer, and the plaintiff's attorney supposing this not to be within the order signed judgment.—Upon which the defendant obtained a rule to shew cause why this judgment should not be set aside; and, on shewing cause, the plaintiff's counsel prayed, that this rule might be discharged with costs. Per cur. There is a distinction between a real and sair demurrer, and a sham one. The former is an issuable plea within the meaning of a judge's order, the latter is not, only an evasion of it; and the rule was discharged with costs. Gray v. Aston. 4 Burr. 1788.

Defendant by leave made two avowries, plaintiff obtained a judge's order for time to plead pleading issuably, and taking notice of trial for the sitting after term and within time, commerced to the suft, and pleaded in bar to the last. De-

Of procuring longer Time to plead; and here in of Summonses, Orders, &c.

fendant figned a non-pross for want of plaintiff's pleading issuably to both avowries; which the court held regular, but upon payment of costs pleading issuably to both, and taking notice of trial within term, the non-pross was set aside.

Barnes 314.

The defendant had time given him to justify his bail, whereupon a rule as usual was given, that he should plead is substantially, and take short notice of trial for the last sitting in term, and then he pleaded a former recovery in B. R.—On motion to set aside this plea and rule given, on shewing cause it was made absolute, and that the defendant's attorney should pay the costs of the application. Cave v. Aaron in C. B. 3 Wilf. 33.

On a writ and declaration of the same term, and an eight days rule given to plead, the defendant, at the end of the eight days, put in a plea in abatement, which the court, on motion, set aside; for they only give that time to plead in chief, and never intend to enlarge the time for a dilatory.

Anderson v. Baddistade. Stra. 1268.

The defendant obtained time to plead, on the terms of pleading an issuable plea, rejoining gratis, and taking short notice of trial. The action was on a bond, conditioned to furrender a copyhold at the request and costs of plaintiff.-Plea, that the plaintiff never requested .- Repl. a request, and plaintiff then made up the iffue with a rejoinder to the country, which the defendant on delivery struck out, and demurred fo near to the affizes, that the plaintiff, expecting a trial, had the record made up, and actually tried the cause before he heard of the demurrer. And now, on motion, the court fet aside the verdict; for the construction of these terms put upon the defendant when he asks time to plead, is not to oblige him in all events to join iffue to the country, but only where the replication offers a fair iffue, and affords no reasonable cause of demurrer; now here the replication not shewing any tender of a surrender, does give such a colour of objection, as will warrant what the defendant hath done. 2 Stra. 1185. Vide Say. Rep. 88.

The defendant had an order by consent from a judge for eight days time to plead, and at the expiration of the eight days, the plaintiff signed judgment without giving a rule to plead. Et per cur. The judgment is regular: Rules are only to give the parties notice when they are expected to plead;

Of procuring longer Time to plead; and herein of Summonfes, Orders, &c.

plead; here the defendant's praying time to plead excludes any prefumption that the plaintiff has not given him such notice. Starkie v. Wilkes. Mich. 7 Geo. 2. in B. R.

A fummons for time to plead ought not to be taken out after the rule to plead is out, and if such summons be taken out and served, it is no stay of proceedings. Barnes 182.

Caf. of Pract. C. P. 137.

If the defendant takes out a judge's summons for time to plead, the plaintiff cannot fign judgment till the summons is discharged. Barnes 161. 187. Rept. & Cas. of Pract. C. P. 144.

Of withdrawing, waiving, adding, and amending Pleas, &c.

WHERE a defendant pleads a sham plea, the court won't let him withdraw it and plead the general issue.

2 Wilf. 369. in C. B.

But if a defendant pleads the general issue, and the same is not entered; he may waive it, and plead specially within four days; and Sunday shall not be reckoned one of the four days. West and West. Ld. Raym. 674.

After a plea of tender and money brought into court, the court will not admit the defendant to withdraw his plea,

and plead the general iffue. Barnes 235.

A defendant having pleaded to iffue; and the plaintiff neglecting to enter the iffue the fame term iffue is joined, the defendant, within the first five days after the next term, may alter his plea, and plead de novo any other plea that he pleases. Praxis Utr. Banci fo. 37.

Leave was given to add a plea after two terms fince the first were pleaded. Waters v. Bovel. 1 Wil. 223. though if motion had been to add a count it would have been

denied.

But in C. B. after the defendant has pleaded a fingle plea, he cannot have leave to add another. Barnes 238, 284.

Rule to shew cause why defendants should not have leave to add to sormer pleas already pleaded by leave of the court, two new pleas, discharged. The question was matter of title, and the cause to be tried at the sittings after term. Defendant had time to apply last term, he is under no surprise. The plaintists cannot now he prepared to answer new matter. Barnes 19.

A defendant cannot withdraw a special plea, but in order to plead the general issue. No special plea can be withdrawn to substitute another special plea in its room. Law v. Law.

Stra. 960.

A defendant was permitted to plead a special justification upon terms, after pleading the general issue. I Wilf. 254.

A defendant cannot waive the general issue or a general demurrer, and instead thereof give a special plea or a specialdemurrer.

But in B. R. if the general issue is not entered, defendant may waive it, and plead specially within four days, and Sunday shall not be reckoned one. West and West. Ld. Raym. 674. Salk. 274. Cases in B. R. 442. Holt. 559.

So

Of withdrawing, waiving, adding and amending Pleas, &c.

So in C. B. leave was given to withdraw the general iffue, after iffue joined, and plead a special justification upon terms, and waiving privilege of parliament. Wilkes v. Wood. 2

Wilf. 204. Wilkes v. Webb. ibid.

But if a special plea or special demurrer be given in, and the book is made up and delivered to the desendant's attorney, he may strike out the special plea or special demurrer, and return it with the general issue or general demurrer, upon leave. Rich. Attor. Prast. B. R. 255, and vide the case of Weld v. Nedham, in B. R. 1 Wilf. 29. But in C. B. if the plaintiff has replied, the desendant must apply to the court and pay costs. 2 Barnes 270.

The defendant cannot waive his plea, upon the last con-

tinuance day, without leave of the court. Sayer 87.

In C. B. the defendant may waive his special plea, and plead the general issue the same term, without payment of costs or application to the court. Rich. Attor. Prast. C. B.

162.

If the defendant has pleaded a dilatory or frivolous plea, the court upon motion will order, that he shall stand by his plea, or plead some other peremptorily on the morrow, which shall not afterwards be waived; but towards the end of the term [because otherwise there might not be sufficient time to give notice of trial] the court requires the defendant, if he will not abide by his plea, to plead another instantly: But this the court will not do till the time allowed by the common rule to plead is expired.

The rule is the same upon frivolous demurrers. Rich.

Attor. Pract. B. R. 1 vol. 240.

To debt on bond for performance of covenants, the defendant pleaded nil debet, to which plaintiff demurred, and joinder thereupon. — And upon defendant's consenting to put the plaintiff into as good a condition as if he had pleaded right at first; the court permitted him to waive his first plea, and plead performance of covenants. Herbert v. Griffiths. Stra. 1181.

The defendant pleaded a *sham plea*, and plaintiff obtained a common rule that the defendant should plead peremptorily on the morrow, and that such plea should not be waived, and served it on the defendant's attorney; who taking no notice of it; the plaintiff, after the day was out, signed judgment. — Which the court on the masser's report held

Of withdrawing, waiving, adding and amending Pleas, &c.

to be irregular, the first plea standing, if the defendant did not lay hold of the opportunity given him of altering it, whereby the plaintiss has the benefit of his motion. Webb

v. Holt. Stra. 1234.

The defendant pleaded the general isse; but forgot to give notice at the same time of a sett-off. And upon motion in time, the court gave leave to withdraw the plea, in order to deliver the same again with a proper notice of sett-off, and said it had been done before. Blackbourne v. Matthias. Stra. 1267.

So the court gave leave to withdraw the general iffue in order to bring money into court, within the reason of the

foregoing case. Tarleton v. Ragg. Stra. 1271.

Defendant by leave of the court pleaded two pleas, not guilty, and a special justification. On the former issue was joined; to the latter plaintiff replied thereto, defendant demurred, and plaintiff joined in demurrer. Plaintiff made up the issue (awarding contingent damages as usual) and before argument of the demurrer proceeded to trial, and had a verdict on the issue. After which desendant moved and had a rule to shew cause why he should not amend the later plea on payment of costs. But the court thinking the application came too late, especially as it appeared that before the trial of the issue, he had applied for the same amendment, and had a rule to shew cause, which his own agent had waived, discharged the rule. Thornley v. Hughes. Barnes 25.

Rule to shew cause why defendant's plea being a special plene administravit (pleaded two terms before) should not be amended by adding a debt due from the intestate, for rent, made absolute on payment of costs. Amendment to be in two days, and desendant to take notice of trial for

next affizes.

Defendant's plea was amended after a special demurrer thereto, from the draught under the counsel's hand. Hat-

ton v. Walker. Stra. 846.

Debt against def ndant as heir on the bond of his ancestor. — Plea reins per descent. Replication assets. Demurrer inde and joinder. The cause was set down to be argued. After which desendant moved to withdraw his demurrer, and rejoin issuably on payment of costs; on shewing cause plaintist insisted, that by the demurrer he had been delayed

Of withdrawing, waiving, adding, and amending Pleas, &c.

delayed an affizes, and defendant came too late now, unless he would give judgment for plaintiff's security. The other side had some doubt of the pleadings and were fearful to venture an argument, because if judgment had passed against desendant on demurrer, the debt must be paid out of desendant's own goods: If on verdict, out of the assets, The court made the rule absolute. Barnes 155.

After the flat. of limitations pleaded, and plaintiff had demurred, the matters in question being actions between merchant and merchant. Defendant moved to add to his former plea the general issue, non assumpsit, but was denied.

Barnes 332.

Defendant pleaded to a fci. fa. on his recognizance, payment by the principal. Replication nonpayment, and iffue tendered. Demurrer inde and joinder. Confilium moved for and the cause set down. After which defendant moved to withdraw his plea, and plead nul tiel record of the recognizance, but denied. Handasyd v. Wilson. Barnes 334.

Motion to withdraw a demurrer and plead the general isfue, was granted, as it appeared that defendant had offered to plead the general issue time enough for the last affizes.

Barnes 337.

Rule absolute to give defendant leave to withdraw his former avowries, and plead the same again with two more added, on payment of costs, [after issues joined twelve months ago] Plaintiff to be at liberty to plead in bar de nevo, and to proceed to trial next assizes. Brownev. James. Barnes 362.

Of special Pleas, and herein of pleading double. &c.

LL special pleas must have a counsel or a serjeant's hand, and be engroffed on treble penny stamped paper; and in the King's Bench are to be delivered to or filed with the clerk of the papers. In the Common Pleas, it may either be delivered to plaintiff's attorney (which is the usual way) or filed with the prothonotary, and then plaintiff's attor-

ney must take it out of the office.

By the 4 Ann. c. 16 f. 4. " Any defendant or tenant in " any action or fuit, or any plaintiff in replevin in any " court of record, with the leave of the fame court, may " plead as many feveral matters, as he shall think necessary " for his defence." Provided, that " if any fuch matter " shall, upon a demurrer joined, be judged insufficient, " costs shall be given at the discretion of the court; or if " a verdict shall be found upon any issue in the said cause " for the plaintiff or demandant, costs shall be also given " in the like manner, unless the judge who tried the said issue " shall certify that the said defendant or tenant, or plaintiff " in replevin, had a probable cause to plead such matter, which, upon the said issue, shall be found against him." Upon the first part of this clause it has been determined, that it does not extend to qui tam actions, so that in them there can be but one plea. 2 Will. 21.

Nor to any action on a penal statute. Barnes 15.

Secondly, it has been determined, that it does not extend to plead double matters which shall have different trials; for instance in dower-If the defendant plead " Ne unques accouple in loyal matrimonie," and a mortgage. For the first matter shall be tried by the bishop, and the other by a jury, and the judge cannot certify if there was a probable cause. Harding v. Harding, C. B. Mich. 9. Anne. Com. Rep. 148.

Thirdly, that the certificate upon this statute may be made

after the trial.

An affidavit is not necessary in order to plead two or more matters under this statute, but the court expects to be informed what the matters be that are defired to be pleaded, in order to judge whether they are proper. The court does not usually go into the materiality of pleas, upon motion for leave to plead feveral pleas; which defendants may do to any number, provided no two of them be inconfistent with each other.—But formerly the court of C. B. expected to be fatisfied of the necessity to plead several material pleas.

Of special Pleas, and herein of pleading double, &c.

Say. Rep. 29. and as appears by various books of practice,

&c. but now they do not fo much regard it.

In case desendant pleads several matters, a rule for that purpose must be drawn up, and served on the plaintist's attorney, when the plea is filed, to obtain which, get a counsel or ferjeant's hand to a motion paper, and leave the same and the drast of your plea, if in B. R. with the clerk of the rules, if in C. B. with the secondary, as instructions to draw up the rule.

If in vacation you apply for this rule, it is necessary (notwithstanding a motion is not actually made) to get a judge's order to authorize the clerk to draw the rule up, which order is made out of course by the judge's clerk without

any previous summons.

In the King's Bench the clerk of the papers with whom all special pleadings are lest, makes out copies thereof signed with his name, and to whom the plaintiff's attorney must apply for a copy in order to draw his replication thereto, unless the replication be of course, and consists in a mere denial of the plea, without alledging any new matter therein, as nultiel record to a plea of judgment recovered; in which cases the clerk of the papers draws up the replication, and delivers the paper book to the plaintist's attorney with a compleat issue.

But if the replication is to be special, containing any new matter, which must be signed by counsel, the plaintist's attorney takes the copy of the plea away with him, paying the clerk for it, in order to get the replication drawn, which being done, signed by counsel and engrossed, is carried and filed with the clerk of the papers, and if further pleadings be had in the cause, the parties alternately take copies thereof from his office, and file their answer thereto, until

iffue is joined between them.

But in the Common Pleas the defendant's attorney may deliver a copy of the plea to the plaintiff's attorney, or file the fame with the prothonotary, and serves a copy thereof on

the plaintiff's attorney or agent.

The defendant, with leave of the court, pleaded non assumpsit and non assumpsit infra sex annos; to the latter plaintiff replied an original; issue was joined on nul tiel record, and judgment for the plaintiff; whereupon he executed a writ of enquiry of damages, and did not further proceed on the issue of non assumpsit, but as to that entred a noli prosequi.

Of special Pleas, and herein of pleading double, &c.

The defendant moved to set aside the writ of enquiry, and on shewing cause, the plaintiff insisted that he might enter a noli pros. on the issue of non assumpsit, and take his execution on the issue that was found for him; and the defendant insisted both pleas went to the declaration, and if any one issue was found for him, the plaintiff was barred of his action. Per cur', It is a judgment only as to part, and not upon the whole proceeding, and the enquiry could not be executed before the other issue was tried. The defendant has a double defence given him, and if any one be found for him, he shall be excused, therefore this writ of enquiry is wrong; and if this way of proceeding was to be allowed, there is an end of pleading double. Prast. Reg. C. P. 320.

Defendants had pleaded to two affaults, &c. laid in the declaration, four several matters by leave of the court. On trial, verdict for defendant on two first, and residue for plaintiff without any damages, and there was no certificate from the judge, that defendants had probable cause to plead the two last pleas. The court thought they had no discretionary power, but are bound by the stat. 4 Ann as the judge had not certified, and made the rule absolute for costs on the latter pleas. Barnes 140.

Four issues were joined on four several pleas in bar to an avowry, three of which were found for plaintiff, and the fourth for defendant. No certificate from the judge that plaintiff had a probable cause to plead the fourth plea. On which defendant moved for costs thereon.—After which the judge certified, so the rule was discharged. Barnes

Plaintiff in replevin pleaded two several matters in bar to an avowry, by way of prescription. One plea was found for him, and there being no certificate that plaintiff had probable cause to plead the other, the desendant moved for costs according to 4 Ann. The question was, whether these proceedings are within the statute or not? The avovant in replevin being omitted in the words of the statute. Rule enlarged. Barnes 144.—Afterwards the court held the avowant to be within the intent and meaning of the statute. And made the rule absolute for taxing avowant's costs. Ibid. 116.

Defendants pleaded three feveral pleas by leave, on two of which issues were joined, on the third for want of a rejoin-Vol. I. N der, Of special Pleas, and herein of pleading double, &c.

der, plaintiff signed judgment quod recuperet, and took out execution. The court held, that after judgment on the third plea, [which was plene adm.] the issues on the two other pleas must be tried before plaintiff can recover. If defendant prevails on any, the plaintiff cannot recover. Rule absolute to set aside judgment and execution with costs.

Baker v. Barlow & ux. extrix. Barnes 269.

Defendant pleaded four pleas as by leave, though he had obtained no rule, but a judge's order. Plaintiff moved that either three of the pleas, or the words "by leave of the court" might be struck out. The statute giving the power of leave to plead several matters to the court only. The pleas were held to be improperly pleaded; but the court gave leave to plead the same four pleas de novo, on payment of costs. Barnes 357.

Of the Replication.

Of Replying, Rejoining, &c. and joining Issue.

THERE is no precise time fixed for replying, rejoining, &c. But if the party who is to do the act is served with a copy of the rule for that purpose, he must reply, &c. within four days * exclusive, after the service of a copy of such rule, and if he does not, a demand in writing having been made, judgment may be signed. But if judgment be signed, or other proceedings had within that time, the same on application to the court will be set assisted.—And sunday, or any holiday on which the court doth not sit, not being the last of those four days, is to be reckoned a day within those rules.

If an interlocutory judgment is figned, and the plaintiff has neglected to give a rule to plead—the defendant must take advantage of that, or any other irregularity two days at least before executing the writ of enquiry, or not at

all. 1 Barnes 165. Pract. Reg. 242.

If a cause has continued four terms without prosecution before issue joined, each party shall have a whole term's notice to reply, rejoin, &c. unless the cause has been stay-

ed by injunction or privilege.

A rule to shew cause "why plaintiff should not be at liberty to withdraw his replication and reply de novo, in having, by mistake of his former attorney, traversed a lease under which he himself claimed," was made absolute, tho six terms had intervened since the replication was filed. Alder v. Chip. Hil. 32. Geo. 2. Burr. 4 part 756.

^{*} Inclusive as usual in C. B.

Df Demurrers.

And making up the Demurrer-book.

F either party demurs to what is alledged by the opponent. the other may join in demurrer, - but if the party has demurred for matter of form only, in which case the causes of demurrer must be particularly set forth and specially stated in the demurrer, whence it is called a special demurrer; and the party demurred to is aware of his informality, he may take out a summons before a judge to amend on payment of costs. - But if not, he may join in demurrer as he must upon a general demurrer, and then the parties are at iffue in law; and the same is referred to the judges of the court before whom the action is brought, to determine.

In the King's-Bench, if there is a general demurrer to the declaration, the plaintiff's attorney adds a joinder thereto, and himself makes up and delivers the iffue thereupon; for which the defendant shall pay 4d. per theet befides stamps,

otherwise judgment may be figned. -

But if the demurrer is special, or if general after a special plea pleaded, the same must be filed with the clerk of the papers who makes up the demurrer-book with the joinder, and gives a rule in the margin, for the defendant to receive and return the same to be inrolled, to the plaintiff's attorney, which if he returns, and pays for the entries, an incipitur is made on the King's-Bench Roll; then get a number roll, and carry the same with the demurrer-book to the clerk of the judgments, enter and docquet the iffue, finish the entry on the roll, and then the fame is carried to, and filed at the nist prius office in Gray's-inn, -after which move by counsel for a concilium, or day to argue the demurrer; draw up the rule with the clerk of the rules [paying for same 4 s.] and apply to the clerk of the papers, and enter the demurrer with him preparatory to argument.

A general demurrer has no need of a counsel's handa frecial demurrer must be figned by counsel.

In making up the demurrer-book the counfels names must be set down. East. 18 Car. 2.

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Df Demurrers.

And making up the Demurrer-book.

THE same in this court.

In this court when demurrer is joined, the plaintiff's attorney in all cases makes up the demurrer-book, and delivers a copy of it on treble penny stamped paper to the desendant's attorney, who must pay for it, after the rate of 4 d. per sheet besides stamps, and also for entering his pleadings and warrant of attorney; then the plaintiff's attorney enters the whole proceedings on the roll; and having delivered it to the secondary, gets a serjeant to move for a concilium, or day for arguing the demurrer, and the secondary draws up a rule accordingly, which must be served on the desendant's attorney, and the demurrer put down in the court book for argument.

If a concilium is moved for before the demurrer-book is delivered to the defendant's attorney, it will be irregular. Rich. Att. Pract. C. B. 201.

After joinder in demurrer, plaintiff moved for a concilium, and delivered the paper book the same day, which was held irregular, and the cause ordered to be made out of the paper. The regular practice is to tender the paper-book to desendant's attorney: If he resuses to accept and pay for it, judgment may be signed for want thereof. If he accepts and pays for it, then plaintiff ought to move for a concilium and proceed to argument. Sharpe v. Sharpe. Barnes 163.

A general demurrer has no need of a serjeant's hand, but a special demurrer must be signed by a serjeant.

In making up the demurrer-book the names of the ferjeants must be set down.

And making up the Demurrer-book.

A general demurrer cannot be waived, but a special demurrer may;—and in case of a frivolous demurrer the court, on motion, will order the desendant to stand by it, or plead de novo on the morrow or instanter.

Before the argument copies of the demurrer-books must be delivered to the judges four days before the day appointed for argument. East. 2 Jac. 2.—But it has been the practice for a long time to deliver the same only two days before.

The attorney for the plaintiff is to deliver copies thereof to the Chief Justice and senior judge—the attorney for the desendant to the other judges.

If one of the parties delivers all the paper-books, on the other party's neglecting to deliver any, the party neglecting will not be heard when the cause comes on to be argued.

All special causes set down by the clerk of the papers to be argued, are to be entered at least sour days before the day of argument, of which notice is forthwith to be given to the attorney or agent on the other side. And all such causes are to be argued in the order they stand entered, and are not to be adjourned by consent, or otherwise, unless the court shall for reasonable cause, verified by affidavit, upon application to be made by either of the parties, their attorney or agent (at least two days before the day of argument) otherwise order. And all such causes remaining undetermined at the end of any term, shall, without any new entry, be continued in the book kept by the clerk of the papers, to come on in the next term in the order they stand. Reg. Mich. 1756.

And making up the Demurrer-book.

The fame in this court.

The same in this court. Mich. 6 Geo. 2.

The same in this court. Reg. 27. Car. 2.

And in case the attorney of either party shall not deliver books as he ought, then if the attorney on the other side, for expediting his client's cause, will deliver books to all the judges three days [now two days] before the argument, counsel shall be heard on his client's behalf at the day appointed; and the attorney delivering books as aforesaid, shall be reimbursed the charges of delivering two books which ought to have been delivered by the attorney of the adverse party, which charges the said attorney shall be bound to pay upon the demand thereof; and if not paid before judgment, the charges thereof shall be allowed upon taxing costs; but if no costs are to be taxed in the cause, then such attorney making default, shall be compelled to pay by uttachment or otherwise.

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Of Judgment thereon, Gr.

If upon argument judgment goes for the plaintiff, you draw up your rule for judgment with the clerk of the rules [paying 4 s.] and if the action found only in damages, as case, trespass, &c. wherein the judgment upon the demurrer is only an interlocutory judgment, you give notice of executing the writ of enquiry, and proceed to the execution thereof.

But when such judgment obtained upon demurrer is final, as in debt, &c. you stamp either the rule for judgment on the demurrer-book with a double half crown stamp, and get the clerk at the nist prius office to attend the master with the roll, who will tax the costs and mark the amount thereof in the margin of the roll, after which you proceed to sue out execution.

If there is a demurrer to part, and an iffue upon other part, and judgment is given for plaintiff upon the demurrer, he may enter a non pross as to the iffue, and proceed to a writ of enquiry on the demurrer; but without a non pross he cannot have a writ of enquiry; because, on the trial of the iffue the same jury will ascertain the damages for that part of which the demurrer was. Salk. 219. pl. 6. The same in C. B.

If either the plaintiff or defendant-refuse or neglect to plead, reply, rejoin, surrejoin, &c. join in demurrer, or enter the issue on demurrer according to the party with whom the matter rests, application is made to the master for a rule for that purpose. It is usually taken on the back of the last pleadings in the cause; which, upon being taken to the clerk of the rules, is entered, paying 1 s. 10 d. a copy of which must be served on the adverse party's attorney.

On all special rules given by the secondary to reply, rejoin, &c. the party who is to do the act, hath four days exclusive of the day of the service of the rule for these purposes, and on failure thereof, judgment may be signed.

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Of Judgment thereon, &c.

I N the Common Pleas you draw up the same rule with the secondary, &c.

In both courts, if there is a demurrer to part, and iffue as to the other part, the iffue generally stays till the demurrer is argued.

When the judgment obtained here upon demurrer is final, as in debt, &c. you stamp either the rule for judgment or the demurrer-book with a double half crown stamp; and carry the same to the prothonatory, who will tax the costs, and mark the same in the margin of the roll, after which you proceed to sue out execution.

Where the defendant deniurs to the declaration, his attorney shall be obliged to accept of notice of executing the writ of enquiry on the back of the rejoinder in demurrer, and where the defendant pleads such a dilatory plea that the plaintiff is obliged to demur, the defendant's attorney shall be obliged to accept of notice of executing a writ of enquiry on the back of such demurrer. Tr. 10 Geo. 1. The same in B. R.

So in like cases in this court, application is made to the secondary for a *similar* rule, a copy of which is served on the adverse party's attorney.

Days as ufual inclusive in this court,

Of Judgment thereon, &c.

I N assumpsit, the defendant pleaded the general issue, and also the statute of limitations: The issue was found against him at the affizes; but as to the special plea, there was a replication, rejoinder and fur-rejoinder; to which the defendant demurred, and the plaintiff joined in demurrer. This term the plaintiff made it a concilium, put it in the paper, and no body to support the demurrer, obtained judgment; it was now moved to fet this afide as irregular, the rule for the concilium having never been ferved, or any notice given of putting it in the paper. But the court held it not to be irregular, and that it was the duty of the defendant to fearch, fince he must expect the plaintiff would preceed. Then it was moved to fet it afide upon payment of costs, upon the foot of setting aside regular judgments. But the court said that was never to be done but where the defendant was to plead to the merits; not to give him the advantage of a nicety in pleading, and if there was any ground for the demurrer [as in fact there was] he might bring a writ of error; but they would not relieve him, tho' he offered to waive a writ of error. Forbes v. Ld. Middleton. Stra. 1242.

The entry of the judgment was, Ideo consideratum est, &c. and not said as usual et quia videtur curiæ, &c. and for that cause it was reversed; for when a demurrer is joined the matter of law is submitted to the court, and they must say whether it is sufficient or minus sufficients, before they pronounce judgment, otherwise it don't appear that they determined the matter of law before them. Attwood v. Burr.

Salk. 402. Ld. Raym. 821. s. c.

Plaintiff obtained judgment upon arguing a demurrer in an action upon the case, and proceeded to execute a writ of inquiry without getting judgment signed by the prothonotary, which the court held to be irregular, and set aside the writ of inquiry. Mac Carty v. Parminter. Barnes 229.

Of Trial by Record.

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RIAL by record is where a matter of record is pleaded in any action, as a fine, a judgment, or the like, and the opposite party denies it, by saying that there is no fuch matter of record existing. The trial of this issue therefore is merely by the record; for, as Sir Edward Coke observes, a record or inrollment is a monument of fo high a nature, and importeth in itself such absolute verity, that if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself. Thus titles of nobility, as whether Earl os no Earl, Baron or no Baron, shall be tried by the King's writ or patent only, which is matter of record. 6 Rep. 53. Also in the case of an alien, whether alien friend, or enemy, shall be tried by the league or treaty between his fovereign and ours; for every league or treaty is of record. 9 Rep. 31. And also, whether a manor be held in ancient demesne or not, shall be tried by the record of Domesday in the King's exchequer.

If a matter of record is pleaded, the other party may reply "nul tiel record", upon this, iffue is tendered and joined in the following form: "And this he prays may be enquired of by the record, and the other doth the like". And hereupon the party pleading the record has a day given him to bring it in, and proclamation is made in court for him to bring forth the record by him in pleading alledged, "or else he shall be condemned"; and on his failure his antagonist shall have judgment to recover: Or if the plaintist's right of action is founded on a record, and the defendant pleads "that there is no such record", the plaintist may reply, "that there is such a record, and this he is ready to verify by that record": And hereupon he shall

have a day given him to bring in the record.

Of pleading auter action pendent.

If to an action, the defendant pleads another action depending for the same cause in the same court, in abatement, the plaintiff has no occasion to reply "no such record", but may crave over of the record pleaded, and have a sule for over the next day; and on default thereof sign judgment. Carth. 453. Theobald v. Long. Ld. Raym.

247. Carth. 517.

In B. R. action for affault, battery, &c. — Plea in abatement, another action depending in same court for the same matter. — To which plaintiff replied nul tiel record; and prayed inspection by the court, without giving liberty to rejoin quod habetur tale recordum. Demurrer inde and joinder, and judgment for plaintiff; because it being a record of the same court, the plaintiff might pray that it might be inspected by the court, if any such there was, as it is reported in Dyer 227. Et per cur. upon this plea, plaintiff might have craved over of the record pleaded, and for want of over might have signed judgment, which is the quickest method of proceeding. Creamer v. Wickett. Carth. 517. Salk. 566. 3 Lev. 243. Ld. Raym. 550.

But per Holt. If it was a record of another court, then there ought to be a rejoinder*, quod habetur tale recordum, &c. and per Holt; judgment final in this case ought not to be signed; but only a responders ousser, for failure of re-

cord is not peremptory.

Note, If upon the replication nultiel record, to a plea of auter action pendent in abatement, there was such record at the time of pleading the plea, though that action was afterwards discontinued, yet such plea is good, because it was true at the time of pleading. — But if a man pleads a recovery by judgment in bar of an action, and the said judgment is reversed after pleading the plea; now such plea is ill, because now it is no such record ab initio. Green v. Watts. Ld. Raym. 274.

An action pending in an inferior court, for the fame thing, cannot be pleaded to an action brought in the fupe-

rior courts.

Note, Upon such plea of auter action pendent, if upon search it appears to the court, that there is such a record,

^{*} But fince this it has been held that there is a compleat issue joined upon nul tiel record with a verification, and that there needs no rejoinder gued habetur tale recordum. Vide z Wilf. 113.

Of pleading auter action pendent.

then the entry ought to be, quia inspectis recordis, &c. apparet, that there is such record, ideo, &c. But if no such record be found, then quia inspectis, &c. non invenitur aliqued tale recordum, &c. then judgment qued respondent ulterius ought to be given for failure of the record. Per

Holt, Ch. J. Ld. Raym. 550.

In B. R. to an action of affault, battery and wounding, on the 6th of June, - and to affault, battery, wounding and false imprisonment, on I August after, - Desendant pleaded not guilty to the latter, and as to the first affault, battery and wounding, that plaintiff had levied a plaint for the same in the Marshalsea, which was removed by habeas corpus into B. R. that defendant put in bail thereto; and which plea in B. R. remains still undetermined; and averred that the plaint levied in the Marshalsea, and the plaintiff's bill for the first assault, battery and wounding, were for one and the same cause, &c. - Demurrer inde, and joinder. And per cur, judgment of respondens ouser. For an habeas corpus does not remove a cause out of the inferior court, fo as to be pending above, and confequently it cannot be pleaded to another declaration for the fame thing: A plaint pending in an inferior court is no plea to an action brought in the courts at Westminster. There is a great deal of difference between a recordari, or a certiorari, and an babeas corpus. In the case of a recordari, the proceedings are upon that, and the recordari is entered upon the roll, and the return of it, which is the plaint; and the plaintiff declares upon that, and the parties have day in court upon the recordari; and fo it is of a certiorari. But upon an habeas corpus the parties have no day in court; but the proceedings below are superseded, and the plaintiff has liberty to declare against the defendant as in custody of the marshal. Seers v. Turner. I.d. Raym. 1102.

T is a maxim in law, " nemo bis vexari debet." A judga ment in a former action is only pleadable in bar of a new action, where the new action is brought for the same cause of action as the first was, that is, where the same evidence will support both the actions, although the actions may happen to be grounded on different writs. This is the test to know whether a final determination in a former action is a bar or not to a subsequent action, and it runs thro' all the cases in the books, both in real and personal actions, But there is a diversity between real and personal actions; Lord Coke means, by actions of the same nature, actions of the same degree, where you can't have a writ of an higher nature, as a bar in a writ ayle, is a bar in a writ of befayle, and in a collateral action, as cosinage, &c. for these are ancestrel, and of one and the same nature; but will not bar a writ of right.—Personal actions are all of the same heighth or degree. 3 Wilf. 308.

But note, a mistake of his action is no bar or estopped to bring a new action. For there is no question, but that if a man mistakes his declaration, and the defendant demurs and has judgment, the plaintist may set it right in a second

action. 1 Mod. 207. 3 Wilf. 309.

Where the demand and recovery is of a thing certain, as where two are bound in 100%, jointly and severally, there recovery and execution against one, is not a bar against the other; for execution is no satisfaction for the 100% demanded.

But where the demand and recovery is of a thing incertain, as where trespass is done by two, which rests only in damages, if the plaintiff recover against one, that judgment is a sufficient bar against the other, for transit in remijudicatam; the property of the goods is changed, so as he may not seise them again. Bull. Ni. Pri. 49.

If a defendant pleads a prior recovery in the fame court, the plaintiff has no need to reply nul tiel record, but may have a rule for the plea to be rejected, unless over is given of the judgment, and upon default thereof may fign judgment. Hunter v. Wiseman, Stra. 823. Same rule in Gwin-

nell and Thompson, Trin. 3 Geo. 2.

There is no difference between a record of the fame court pleaded, and a record of another court: The issue complete upon the replication nul tiel record, without a rejoinder. Where the desendant avers a record, and plain-

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tiff gives him a day to bring it in, the conclusion of the replication is as follows: "And this he is ready to verify, and prayeth that the said record may be seen and inspected by the court [or if in C. B. by the justices] here. And because the said B. hath not the said record now ready here in court, it is said by the said court here to the said B. that he have the said record here on [if by original, a general return day—if by bill, a day certain in term.] The same day is given to the said A. here, &c."

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Where the plaintiff avers the record, the conclusion of the replication is thus: "And this he is ready to verify by the faid record, and prays that the faid record may be feen and inspected by the court here. And because the said A. hath not now that record ready here in court, he is directed that he have that record here, &c. The same day is given to the said B. here, &c. Barnes 336. Newbury v. Strudwick, East. 9 Geo. 2.

To a declaration in C. B. defendant pleaded a judgment in B. R. for the same cause.—The plaintiff replied nultiel record, and concluded with a verification.—Demurrer for that cause and joinder, and the replication held well, especially as it was a record of another court; and the court seemed to think that either way was well enough. 2 Hilf.

Action of assumpsit, and after issue joined on nul tiel record, the plaintiff's attorney delivered the book, with a day [viz. Monday] to bring into court the record by him averred; and the record not being brought in that day, plaintiff drew up a rule for judgment nist on Wednesday next; signed judgment and executed a writ of inquiry. Desendant objected to the judgment, that the rule should have been, unless cause within four days, and not for a shorter time. Per cur'. Where the judgment is final, the rule should be, unless cause in four days, that desendant may have that time to move in arrest of judgment: But where the judgment is interlocutory (as in this case) that reason fails, and there is no occasion for a four days rule, because the desendant may move in arrest of judgment after the inquiry executed. Hopkins v. Knapp, Barnes 264.

Where the proceeding is by original, and a general return day is given to bring in the record, the defendant ought to be called to bring in the record at the rifing of the court that day: And if he fail, the rule for judgment should be, unless cause on the appearance day of that general return,

and the record may be brought in on that, or any inter-

vening day.

But where the proceeding is by bill, and the day given to bring in the record is a day certain, the record cannot be brought in after that day; but on that day, at the rifing of the court, defendant ought to be called to bring in the record; and if he fail, the court will appoint the day to be inferted in the rule for judgment nisi causa. The rule drawn up for judgment nisi was therefore held good, and the objection to the judgment over-ruled. Same case.

Upon an issue of nul tiel record, the plaintiff delivered the book, and gave himself a day to bring in the record, viz. tres Trin. July 8. but did not bring in the record on that day. July 9. plaintiff offered the record, and moved that it might be read, which was resused by the court, it not being brought in on the day which plaintiff had given himself to produce it. Calverac v. Pinhero, Barnes 343.—but said in same case in Barnes 85. that the plaintiff may continue the day for bringing in the record by him averred.

Debt on judgment in C. B.—Plea, that plaintiff had recovered a judgment in B. R. To this plaintiff replied nul tiel record, and delivered the iffue with a day given in it for defendant to bring in the record at his peril. Defendant infifted that the replication of nul tiel record should not have been delivered in the issue book, and day given to bring in the record, but that plaintiff should have given him the replication by itself in form, and have given a rule to rejoin, therefore moved that plaintiff should take back the issue book delivered, and deliver a replication in form, and also repay the money he took for the issue.—On shewing cause, the court were of opinion, that a rejoinder in this case was totally unnecessary, after a complete issue joined, and that the delivery of the issue was right. Rule discharged. Barnes 335.

Assumpsit in C. B. Plea, judgment recovered in B. R. and this he is ready to verify by the record.—Plaintiff replied nul tiel record, concluding with a general averment thus, viz. and this he is ready to verify, &c. Demurrer for that cause; as the replication should have concluded with giving defendant a day to bring in the record. On argument it was thought well either way. Vide Barnes 161.

and 2 Wilf. 113.

In C. B. on an issue of nul tiel record joined in an action of debt on judgment, wherein plaintiff had declared for 95 l. adjudged to him for damages, occasioned by non-performance of promises and undertakings, &c. The plaintiff produced a record of the judgment, to verify his declaration; whereupon it was objected for desendant, that the record produced contains a recovery of 95 l. part for damages, and the residue for costs; and the record alledged is a recovery for damages only. But this objection was overruled, and judgment given for plaintiff. The declaration is in the settled constant form of this court used in such declarations and in writs of scire facias to revive judgments. After the costs incorporated with and made part of the damages, the conclusion of the judgment is, which said damages in the whole amount to 95 l. The form of the King's Bench differs from that of this court. Turton v. Rishton, Barnes 274.

To an action for money had and received by defendant for plaintiff's use. The desendant pleaded an action of trover by plaintiff, for taking and converting goods of plaintiff, and judgment for defendant therein; and averred, that the goods for which that action of trover was brought, are the same identical goods, for the produce whereof the present action is brought. To which the plaintiff demurred and had judgment, the court being clear of opinion, that a judgment for the desendant in trover, is no bar to an action

for money had and received. 3 Wilf. 240.

Judgment in trespass for defendant is a good bar to trever for the same goods. 1 Show. 146.

So is a judgment in trover a good bar to an action on the case for the same cause of action. 3 Wilf. 304.

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T O an action on a bail bond, defendant pleaded comperation and diem, replication nul tiel record of the appearance, and day given to bring in the record. On the day given for the defendant to bring the record of the appearance into court, he did produce a record of bail and furrender thereupon; but one person only being bail, it was looked upon as no bail, and plaintiff had judgment for

failure of record. Smith v. Randall, Barnes 247.

If a plaintiff declares upon a recognizance of bail generally, without fetting forth the condition, and the defendant pleads nul tiel record, and upon day given the plaintiff shews a recognizance with a condition, the iffue is with the defendant; for a record which comprizes that upon which the plaintiff declares and more, is not the same record with that upon which the plaintiff declares. Vide the case of Ward v. Griffith. Ld. Raym. 83.

If upon an iffue of nul tiel record of a judgment, a record of the judgment is produced, the party and all that claim under him are estopped to say there is no such judgment. For it is entred upon the roll quod babetur tale recordum, and the party can never say, that this was not the judgment against him, but that it was another judgment.

Vide Ld. Raym. 1050.

A writ of error was brought of a judgment in ejectment in C. B. and the defendant in error fued out a feine facias quare ex. non, to compel the plaintiff to affign his errors, and there was a variance in the feire facias from the judgment; for the judgment was of two meffuages, and the feire facias recited it to be but of one. The plaintiff in error perceiving this variance, pleaded nal tiel record of the judgment. On which it was moved to amend the feire facias, but denied, after the plea of nul tiel record; but if no advantage had been taken of this variance, the court faid, they might have amended it. Vide Bucksome v. Hostin. Ld. Raym. 1057.

Action against defendant by a wrong name, misnomer pleaded in abatement. On which plaintiff, without more, declared against him de novo by his right name, and the desendant pleaded the former action pendent, &c. and then plaintiff moved to discontinue his former action.—But per Holt, it is too late to do it now, because the discontinuance only relates to the time of it's being entred upon the record; so that if plaintiff should now enter it, and reply nul tiel

record,

record, it would be against him, because it was a record at the time of the plea pleaded: And it is not like the reversing a judgment, or outlawry on a writ of error, which avoids the record ab initio: So that on nul tiel record, if the judgment be reversed before the day given to bring in the record, it is sufficient. Bezaliel Knight's case. Ld. Raym.

1014. Salk. 329.

Error of a judgment tested the first year of the queen, judgment was not given till the third, and then the record was transcribed, and brought into court. And the defendant sued out a scire facias quare ex. non to compel assignment of errors. To which the plaintiss in error pleaded nul tiel record, and upon bringing in the record, the counsel for plaintiss in error moved, that there was a failure of record, which the court agreed. For they said, that the plea is nullum tale habetur recordum, which refers to the scire facias, which recites a record of a judgment in C. B. removed hither by writ of error, which this record never was, no judgment having been given till after the return of the writ of error was out. Thach, justice said, that this being a record of the same court, it would have been most proper to have prayed over of it. Wilson v. Ingolsby, Ld. Raym. 1179.

Where a record itself is shewn to the court in pleading, the defendant cannot say nul tiel record: For by the profess in curia it appears to the court that there is such a record: As, if letters patent are pleaded, the defendant may say non concession, but not nul tiel record. Co. Lit. 260. a. Hard.

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Upon the issue nul tiel record, if the record be in a county palatine, there shall be a writ to the chamberlain to certify, &c. Clift. 148.

So if it be in an inferior court, there shall be a writ to the proper officer to certify, &c. Bro V. M. 244.

And if the officer refuses to certify, there shall be a rule to do it upon pain, and if he does not, an attachment.

Palm. 562.

In an action against H. defendant, pleaded the composition act; the plaintiff replied nul tiel record: Upon the day given to bring in the record, the desendant brought in the printed act. Per Holt, Ch. J. An act printed by the king's printers is always allowed good evidence of the act to a jury, but was never allowed to be a record yet; you must get an exemplification under the great seal, and then plead

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it exemplified, and then no man can deny it. Ann. Salk.

566.

Per Holt, C. J. Where the plaintiff misrecites a private act of parliament, and the defendant demurs to the declaration, judgment shall be given for the plaintiff, for it shall be taken to be as 'tis pleaded, because by the demurrer 'tis' confessed to be so. Therefore if defendant will take advantage of the misrecital of an act of parliament, he must plead nul tiel record, or alledge that 'tis further enacted so and so, &c. Platt v. Hill. 3 Salk. 530.

And per Holt in the same case, If a man missecites a general statute, the other side cannot plead nul tiel record, but must demur: And then, if the missecital was of substance, and the party upon reciting it concludes by force of the statute aforesaid, or against the form of the said statute, 'tis naught; but if he conclude against the form of the statute in that case made and provided, or the like, it is good.

The plaintiff in an action against the sheriff, described a bill of Middlesex as the precept of the king: And on nul tiel record it was objected, that it ought to be set out as the precept of the court, the words being praceptum est vice-comiti, as the award of the court. E contra it was insisted, that in every latitat it is set out with "Whereas we lately commanded our sheriff," and in 2 Saund. 52. 151. it is set out in this manner: Et per cur'. Judgment quod persecit

recordum. Harris v. Bernard. Stra. 1069.

Error, ê C. B. in a judgment upon a scire facias on a recognizance, the recognizance was entred into upon bringing a writ of error upon a judgment in the Common Pleas in an action of debt, and was conditioned, that if the plaintiff in error should be nonsuited, or the writ be discontinued in his default, or the judgment should be affirmed, that then the plaintiff should pay, &c. The defendant pleaded after over of the scire facias and condition, that the plaintiff in the writ of error did profecute the writ of error with effect, and did assign errors, and that the plea thereupon remained still undetermined. The plaintiff replied, that the judgment was affirmed absque boc, that the plea remained still undetermined. Demurrer inde and joinder, and judgment was given for the plaintiff below. Which was held bad on exception taken to the traverse in the replication, as it was a traverse of a matter of record, and a matter of record ought not to be put in iffue to be tried by the country, but the plaintiff ought to have replied, that the judg-

ment was affirmed prout patet per recordum, and if not so, the desendant might have rejoined nul tiel record. The judgment was going to be reversed for that cause, but on another exception taken to the writ of error, the same was quashed. Fanshaw v. Morrison. Ld. Raym. 1138.

Debt—Outlawry in bar after imparlance,—replication nul tiel record, and the defendant had a day given him and failed,—and the question was, what judgment? And it was said, that if the plaintiff would pray only for a respondent ousler, he might so pray, for it is his delay only and no error. But he prayed judgment absolutely, and so it was awarded niss, and afterwards, on conference with other judges, it was held right. Cro. Car. 566.

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gent Debt on bond—Defendant pleaded that plaintiff brought another action upon the same bond, and that the defendant had pleaded thereto non est factum, and that the jury had found it was not his deed. The entry of the verdict there was, that the defendant should have his damages against the plaintiff, et quod eat inde sine die. But no judgment quod querens nil capiat per breve; so there was no judgment to bar him of another suit, therefore the court held the plea insufficient. Cro. Jac. 284.

In debt — Defendant pleaded outlawry in plaintiff, to which he replied nul tiel record; and the truth was, that at the time of the plea pleaded he was outlawed, but, before the day affigned for bringing in the record, it was reversed.

—The court awarded a respondens ouster. Ison v. Gray.

Cro. Jac. 484. Vide Dy. 228.

Note, Outlawry in plaintiff is either pleadable in abatement or in bar.—In trespass and other actions, where the damages are incertain, and consequently the right of action not forseited, there outlawry can be only pleaded in abatement, because tho' the plaintiff is under a disability, yet the right of action remains in him: But otherwise in debt, assumption for a sum certain, &c. for there the debt being forseited to the crown, the plaintiff has no right of action in him, and therefore in those cases outlawry may be pleaded in bar. Co. Lit. 128. Vide Ld. Ray. 1056.

Outlawry does not disable, nor does error lie upon it, till it appears of record, either by return of the exigent, or removal of the outlawry by certiorari. But outlawry in a county palatine does not disable plaintiff from suing in any court at Westminster.

0 3

Where

Where any person pleads a judgment or matter of record in the same court, the party so pleading the same shall, upon demand, give the attorney for the plaintiff a note in writing of the term, and number roll whereon such judgment or matter of record is entred and filed; and in default thereof, such plea is not to be received.

On bringing the record into court on the day given, the clerk of the rules in B. R. or secondary in C. B. will draw up a rule for judgment nist in four days, at the expiration of which, a certificate may be obtained at the soot of the rule that no cause has been shewn, after which judgment

may be figned.

If the record is not brought in on the day given, upon being called for by the crier, judgment of failer of record may be entred, and if the judgment is final, as in debt, &c. a rule for final judgment nist causa in four days should be taken out, and if no cause shewn, then judgment smal may be entred up; but if, upon failer of record, the intervention of a jury is necessary to ascertain the plaintist's damages, there is no occasion for a four day rule, till after the inquiry executed.

The entry of failer of record is thus: "At which day comes here as well the faid A. as the faid B. by their attornies aforesaid, and the said B. hath not here the faid record, but maketh default: Whereby it sufficiently appeareth to the court here, that there is not any such record of the said recovery, as the said B. hath above

" alledged; wherefore, &c."

Charles State

If

Of making up the Iffue.

EVERY clerk or attorney of B. R. may, according to the ancient rules of the court, make up iffues and demurrers in the following cases, viz. Every iffue that may be given on the book side in the office.

Not guilty to a new affignment in trespass.

To the bar of fon frank tenement. Comperuit ad diem to a bail-bond.

Nul tiel record to a Scire facias, or action of debt on judg-

A general demurrer to a declaration.

In covenant wherever the defendant tenders an iffue to the country.

Every special non est factum. Every son assault demesne.

All issues and demurrers upon every writ of error, scire facias, and audita querela.

All repleaders.

When the pleadings are special, and issue is joined, the elerk of the papers having a copy of the declaration made out for him by the plaintiff's attorney, makes out and delivers him the paper-book, with a rule in the margin thereof, ordering that the defendant receive the same, and return it to be enrolled within the time thereby given.*; and if issue is joined, the plaintiff's attorney usually indorses a notice of trial on the paper-book, and then delivers it to the defendant's attorney who must return it to be enrolled, according to the rule given in the margin by the clerk of the papers; which if he neglects to do, [and does not pay 8 d. per sheet for the pleadings on this side, and 4 d. per sheet for those on the side of the plaintiff,] judgment may be signed, and the plaintiff need not accept the book, tho' tendered afterwards.

But neither the declaration, flamps, or other part of the book, are paid for by the defendant, on returning the paper-book, unless he has not paid for them before.

^{*} The plaintiff's attorney pays him for it 8 d. per sheet for the whole book, and 4 d. per sheet for all pleadings subsequent to the declaration, besides stamps.

Of making up the Illue.

mile soft the recipients

In all cases in C.B. when is of the plaintiff's attorney delivers the defendant's attorney a copy thereof on treble penny stamped paper, he paying for the same after the rate of 4 d. per sheet, besides stamps; and for the entry of his plea, according to the length; if the general is only 2s, and for filing his warrant of attorney 8 d. But if the issue be of the same term with the declaration, and the defendant has paid for one copy of the declaration, he is only to pay for a copy of the pleadings subsequent to the declaration, as he is not to pay for two copies of the declaration the same term. Rich. Attor. Pract. C. B. 167.

If the plaintiff has entered the appearance for the defendant, he may charge for it on the back of the issue; and if the defendant's attorney will not pay for it, he may sign

judgment. ibid. 168.

The practice was formerly that the defendant's attorney must pay for the copy of the issue at all events, or the plaintiff might sign judgment; and if it be overcharged the defendant might apply to the court. But now it is held that if the defendant's attorney is ready to pay, and tenders what is really due, it is sufficient. —— But note, Where the defendant is a prisoner, and no attorney appears to be concerned for him, the plaintiff cannot sign judgment for not paying for the copy of the issue.

If the paper-book be made up and delivered in term, or within eight days after, the defendant's attorney must return it in four : And if the venue be laid in any other county than London or Middlesex, it must also be returned in four

days, notwithstanding the time of delivery.

But if the venue be laid in London or Middlefex, and the book is not delivered till eight days exclusive after the end of the term, the defendant has till the fourth day of the next term to return it, as it was too late to give notice of trial for the then fitttings after term. - In a country cause it is otherwise, where notice of trial might be given in due But in all cases, if the plaintiff's attorney accept the book

after the limited time, he cannot fign judgment.

If the paper-book be of an issue in fact, the four days for keeping it are to be reckoned exclusive of the day of the delivery; if of a demurrer or an issue in law, the four days are

reckoned inclusive.

Upon delivery of any paper-book wherein an iffue is joined and notice of trial given on the back of the book, if the fame be afterwards waived, and the general iffue given, the notice which was given for the trial of the special iffue

shall ferve for notice of the general iffue.

By the 4 & 5 Anne. c. 16. f. 3. " It is enacted, that the attorney for the plaintiff or demandant in any action or writ, shall file his warrant of attorney with the proper officer of the court where the cause is depending in the same term he declares; and the attorney for the defendant or tenant shall file his warrant of attorney as aforefaid, the same term he appears under the penalties inflicted upon attornies by any former law for default of filing their warrants of attorney.

The penalty of 101 is given for default of filing the warrant of attorney, and further punishment by imprisonment at the discretion of the court, by flat. 32 Hen. 8. 2. 30. f. 2. made perpetual by 2 & 3 Ed. 6. c. 32. and vide

the flat. 18 El. c. 14. f. 3.

The plaintiff's attorney generally files the warrant of attorney for the defendant at the same time he usually files his own warrant of attorney, and charges 8 d. for it.

The warrants of attorney are written on parchment in

in the following form:

Easter term in the 20th year of the reign of King George the third.

Middlesex. A. B. putteth in his place R. C. his attorney against C. D. [late of, &c. if by original] in a plea of trespass on the case, or whatever the action is.

Middlesex. C. D. [late of, &c. if by original] putteth in his place O. P. his attorney in the plea aforelaid.

If defendant is described with an alias dictus, or if the plaintiff or defendant be an executor or administrator, or affignee, &c. he must be named in the warrant of attorney accordingly, and the nature of the action must be expressed therein.

But notwithstanding the statutes and rules of the courts respecting warrants of attorney, it has been held on error from C. B. into B. R. that a warrant of attorney of any term pendente lite is sufficient to warrant the proceedings; and there is no necessity it should be of the term in the pla-

cita. Noke v. Caldecot. Stra. 526.

A plea in abatement which had been demurred to, but never deserted, nor any judgment had upon it, was omitted in the plea roll, between the declaration and the plea of nil debet. And the court held that this irregularity was cured by defendant's accepting the issue and paying for it. His objection should have been at that time, is too late now—mearing in arrest of judgment, or on motion for a new trial. Combe v. Pitt. Burr. 4 pt. 1682.

If there has been a plea in abatement and judgment of responders ouser, after which desendant pleads in chies, yet the plea in abatement ought to be entered in the issue, and niss prius record—for as it is in the plea roll, it must be mentioned in the niss prius record, for otherwise it would not appear to be a trial in the same cause, and judgment would be arrested. Vide Ld. Raym. 329. Carth. 447. 5 Mod. 399.

Defendant pleaded and delivered a plea to plaintiff's attorney who made up the issue and delivered it to the defendant's attorney, who paid for it; but finding afterwards it should have been made up with the clerk of the papers, [it being in B. R. and the pleadings special] went and paid him his fees, then made up the record and went to trial, and the court resused to set it aside, the defendant being in the first fault, and not leaving the plea at the office. Thompson v. Tiller. Stra. 1266.

The courts have given leave to add a plea after iffue

joined.

Defendant had avowed for a quit-rent, and iffue was joined. In the term following defendant moved to amend by adding three avowries for quit rents payable at different times, on payment of colls. Rule made absolute, the plaintiff not confenting that defendant might give the matter in evidence on the present iffue. Barnes 22.

After the plaintiff and defendant have joined in the iffue which is to be tried betwixt them, neither of them can de-

mur without the consent of the other; for by joining in the iffue they have admitted the pleadings to be good and sufficient to try the iffue. Show. 213. Lil. Reg. 437. Barnes 84.

But a demurrer to an appeal hath been received after issue joined. Cro. El. 196. But it hath been adjudged that a demurrer to an indictment ought not to be received after verdict. Sid. 208.

The iffue and nifi prius roll may be amended by the plea

roll. Sayer Rep. 76.

Is was tendered by defendant, and the plaintiff joined is thus, "and the aforesaid defendant does so likewise," instead of saying, "and the aforesaid plaintiff does so likewise;" and this being objected in arrest of judgment, the court over-ruled it, and established the judgment. Harvey v. Peake. But if no similiter is joined, it will be satal the after verdict. Vide Stra. 641.

Where an iffue is only misjoined, judgment shall not be arrested after verdict, it being cured by the express words of

32 H. 8. c. 30.

Debt on judgment in C. B. Plea judgment recovered in B. R. Replication nul tiel record, and the plaintiff delivered the iffue with a day given in it for the defendant to bring in the record at his peril. On which defendant infifted, that the replication of nul tiel record should not be delivered in the iffue-book, and day given to bring in the record; but that the replication ought to be given by itself in form, and a rule thereon to rejoin, and therefore moved that plaintiff should take back the iffue delivered, and deliver the replication in form, and also pay the money he took for the iffue. But on shewing cause the court were of opinion that a rejoinder in this case is totally unnecessary after a compleat issue joined, and that the delivery of the issue was right. Rule discharged. There is no difference between a record of this court pleaded, and a record of another court. issue is compleat on the replication without the rejoinder. Barnes 335. Newbury v. Strudwick.

The plaintiff's attorney sent a copy of the iffue to the chambers of defendant's attorney. The defendant's attorney and clerk being out, and the porter left in the chambers, the iffue was tendered to him, and the money charged thereon demanded, and he not paying the same judgment was signed, which was held regular, but was set aside on

payment of costs, &c. Rolt. v. Way. Barnes 253.

The issue book was left in the office, and notice left under the chamber door of the defendant's attorney the same day; next day, on finding defendant's attorney at chambers, the plaintiff's attorney gave him notice that the

iffue

iffue book was left in the office, and demanded the money due for the same, which the other refused to pay, infisting that the issue ought to be brought to him. Whereupon plaintist's attorney signed judgment: The court on hearing counsel and the prothonotaries, held, that the defendant's attorney must pay for the issue book at his peril: And is he is not to be found, the issue book may be left in the office, and they discharged the rule obtained to set aside the judgment nist; but let the defendant in to try the merits, and set aside the judgment on payment of costs, pleading the general issue, and taking short notice of trial. Glascock v. Martal. Barnes 243.

Rule was made absolute, giving plaintiff leave to deliver a new issue properly entitled; in the title of the issue already delivered the word (George) was omitted: It stood thus, Hilary Term 20th of King the second. Barnes 18.

The plaintiff's attorney fent the issue book to the defendant's, who accepted it and paid for it; but the plaintiff not going on to trial, the other side gave him a rule to enter this issue in order to carry down the cause by provise; and upon an affidavit that the plaintiff's attorney had missaid the papers, the court ordered the defendant's attorney to give him a copy of the issue, the better to enable him to comply with the rule. Stra. 414.

Judgment was figned for want of paying for the issue book, and defendant had a rule to shew cause why the judgment should not be set aside. On shewing cause, it appeared that the plaintist had demanded and charged for the issue book 6s. 8d. more than was due. The court were clearly of opinion, that the old doctrine that desendants must pay whatever was demanded for paper-books ought to be exploded; it is sufficient if they are ready to pay what is really due. Let the judgment be set aside with costs, defendant taking short notice of trial for the third sitting. Gardner v. Goodal. Barnes 263.

Judgment figned for nonpayment of the issue book tendered at the defendant's attorney's house twice at proper hours, though not left there, held to be regular; — and

rule to flew cause discharged. Barnes 275.

Motion to set aside judgment for nonpayment of the issue; plaintiff's attorney in town not calling on defendant's agent then for a plea: It appeared on shewing cause, that defendant had pleaded by his country attorney; there-upon plaintiff's attorney in the country tendered the issue, which defendant's attorney refused to pay for: On which plaintiff's attorney sent to his agent in town to sign judg-Judgment

ment, and held good; defendant's attorney having undertook to be the agent by pleading in the country. Barnes 230.

More money was charged on the issue book than was due, viz. 23. 4d. for a second copy of the declaration, which was of the same term with the issue, and defendant refusing to pay, plaintiff signed judgment: The court held it necessary that the defendant's attorney should tender the sum due, and for want of such tender, they discharged the rule to shew cause why the judgment should not be set aside. Barnes 275.

Action for words. Defendant by leave pleaded four feveral matters, and the fourth plea was accord and fatisfac-Plaintiff's agent delivered an issue, made up the record and proceeded to trial, after iffues joined on the three former pleas, but without replying or noticing the fourth. Defence was made, but plaintiff obtained a verdict. which a new trial was moved for, and it appeared that the defendant had given some evidence on the fourth plea, tho' improper. Per cur. Let the rule be, that the plaintiff do either demur, or reply issuably to the fourth plea. If he demurs, that proceedings be stayed till after argument. he replies iffuably, that a new trial be had at next affizes, and the costs of the former trial, and motions attend the event. Barnes 465. Whitehill v. Carr.

Where there are special pleadings in a cause, and the defendant would delay the plaintiff, and prevent the expence of a trial, when the paper-book is delivered to him, he may scratch out the similiter joined, and leave a demurrer to the plaintiff's replication in the office; and when the time is out, return the book with notice thereof in this manner:

Mr. I. M.

I have ftruck out the rejoinder, and left a demurrer to the plaintiff's replication in the office

But to prevent this trick, the plaintiff, if he is apprehensive that the desendant's plea is dilatory or frivolous, should move the court that the desendant abide by his plea, or plead another instanter. However, should it be practised the paper book must be carried back, the demurrer entered with a joinder thereto, and the demurrer book made up, which the plaintiff's attorney may again deliver over to the desendant's, who in such case must return it to be inrolled in one day, and pay for the entries, &c. But on returning which he may scratch out all the special pleadings, and give the general issue.

Of making up the Iffue by Bill.

In B. R.* all the pleadings are to be fairly transcribed in the order they were pleaded, with a † memorandum at the beginning shortly stating the commencement of the action; then the declaration, and if the plea was not of the same term with the declaration, then an imparlance, and so on with the award of the venire to the sheriff, commanding him to summon a jury to try the issue joined between the parties; and lastly, a dies datus for them to be in court at the hearing of the cause.

The memorandum beginning the iffue by bill, shewing the commencement of the action, varies in four cases.—

1. When the issue is joined in the same term with the declaration.

2. When the cause of action arises within the term in which the plaintiff declares, and then the declaration must be entitled of a particular day in that term, and the memorandum also.

3. When the declaration is of a precedent term to the plea. And 4. When the declaration is above four terms before the issue is made up.

When the issue is joined of the same term in which the plaintiff declares, the issue is made up with the memorandum thus:

Michaelmas term in the 19th year of king George the third.

(Stormont and Way.)

Middlesex, to wit. Be it remembered, that on Saturday next after the Morrow of all Souls, [the first return of the term] in this same term before our lord the King at Westminster, comes A. B. by William Lyon his attorney, and brings into the court of our said lord the king, before the King himself, now here, his bill against C. D. being

^{*} Note, When the proceedings are by bill in C. B. as against attornies, privileged persons, &c. the issue is made up exactly in the same manner as the issue by bill is in B. R. except in the sile of the court; and if against an attorney, by making him present in court in his own proper person.

[†] The proceedings in civil actions being formerly the bye business of the court of B. R. they were entered with a memorandum.—And proceedings in C. B. by bill against their own officers or attornies being the bye business there, the proceedings are made up with a memorandum also.

Of making up the Issue by Bill.

in the custody of the marshal of the marshalsea of our said lord the king before the king himself, of a plea of TRESPASS ON THE CASE, [or whatever the action is] and there are pledges for the profecution thereof, to wit, John Doe and Richard Roe: Which said bill follows in these words, to wit, Middlesex to wit, A. B. complains against C. D. being, Sc. [reciting the whole declaration, omitting the pledges at the end thereof.] And then in a new line begin the plea, it being of the same term with the declaration.

And the faid C. D. by John Martin his attorney comes and defends the wrong and injury, when, &c. [reciting verbatim the whole pleadings till issue joined, and then award the venire thus:] Therefore let a jury come before our lord the King at Westminster, on next after fifteen days of St. Martin [some return before the trial in the same term,] and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the said parties there.

These &c's are contractions of the writ of venire, the form of which, vide post under the title "of making up the record for trial."

If the plaintiff brings his action and declares in term time, and iffue is joined in the fame term, the memorandum must be of a particular day in term, as must the declaration also be entitled; and then the issue is made up thus:

Essex, to wit. Be it remembered, that on Saturday next after the Morrow of St. Martin [some return day preceding the commencement of the action] in this same term before our lord the King at Westminster, comes, &c. [exactly as before.]

If the declaration is of a precedent term to the iffue joined, then it is made up thus:

Sussex, to wit. Be it remembered, that in Michaelmas term last past, before our lord the King at Westminster, came A. B. by William Lyon his attorney, and brought into the court of our said lord the King, before the King himself, then there his bill against G. D. being, &c. [as before.]

And

Of making up the Iffue by Bill.

And after the declaration begin a new line with an im-

And now at this day, to wit, On Monday next after the Octave of St. Hilary, [the first day of the term issue is joined.] in this same term, to which day the said G. had leave to imparle to the said bill, and then to answer the same before our lord the King at Westminster, comes as well the said A. by his attorney aforesaid, as the said G. by John Martin his attorney; and the said G. defends the wrong and injury, when, Sc. [inserting all the pleadings, and awarding the venire as before.]

And if the declaration is of above four terms before the issue is joined, then the issue is made up thus:

London, to wit. Be it remembered, that heretofore, that is to say, in Trinity term in the nineteenth year of the reign of our sovereign lord the now King, before the King himself at Westminster, came A. B. &c. [as above making the imparlance to the term the issue is joined.]

But if the venue is in a county polatine, there must be an award of a special venire and mittimus in the following manner.

Therefore let a jury be made thereof, and because the issue aforesaid between the parties aforesaid ought to be tried by men of the county palatine of Lancaster, that is to say, of the body of the faid county, where the writ of our faid lord the King doth not run, and not elsewhere. Therefore to try the iffue aforesaid, between the parties above joined, let the record of the plaint aforefaid be fent to his Majesty's justices of the said county palatine of Lancaster; so that the fame justices by his said Majesty's writ of that county to be duly made out, and to the sheriff of the same county directed, do command the same sheriff that he cause twelve good and lawful men of the body of the faid county of Lancaster, to come before the said justices, at their next general fession of assize to be holden for the said county, after the said record shall be delivered to them, each of whom, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. And when the verification and iffue aforesaid shall be there made and tried, that VOL. I.

Of making up the Issue by Bill.

then the said justices shall send the record of the plaint aforesaid, together with every thing that shall be done thereupon before them in his said majesty's court there, to our said lord the king at Westminster at a certain day which the said justices shall appoint the said parties to be in the same court, there to hear judgment thereupon.

If it is a Welsh iffue to be tried in the next English county,

the award of the venire is thus:

And because the issue aforesaid between the parties above joined, ought to be tried by men of the next English county to the said county of Carmarthen, and not elsewhere. And because the county of Hereford is the next English county to the said county of Carmarthen. Therefore let a jury of the said county of Hereford, come thereupon before our lord the king at Westminster, on Wednesday next after three weeks of the Holy Trinity [some return before the trial] and who neither, &c. To recognize, &c. because as well, &c. the same day is given to the said parties there.

Note, In a Welsh iffue when tried in the next English county, the jurata, venire, and distringuis are all exactly the same

as if the venue were laid in that English county.

Defendant pleaded a tender the fourth of May ante diem exhibitionis billæ, the plaintiff replied, non obtulit ante diem, &c. and to ouft the defendant of the benefit of the plea, made up the iffue book with a general memorandum, that would refer to the first day of the term, which was before the fourth of May. But on motion [an affidavit being made that the tender was upon the fourth, and no writ taken out till the fixth of May] that plaintiff might be obliged to make his memorandum special according to the truth of the fact, and after a rule to shew cause, the same was ordered accordingly. Smith v. Key. Stra. 638.

In affault and battery, the memorandum was generally of Michaelmas term, and the fact on fans affault proved was on a day within the term; and a case being made of this at nist prius, it was held well enough; for the plaintist needed have given no evidence on this plea, unless to aggravate damages, and the court will not non-suit him, because it is amendable by a new bill. Guy and ux. v. Kitchener and others.

Stra. 1271.

The memorandum in the beginning of the record was de placito debiti, but the declaration was in a plea of annuity, and fo a variance. But the court ordered it to be amended, being lapfus clerici. Davis v. Stringer. Carth. 354.

Thoug

Of making up the Isfue by Bill.

Though the words de placito, &c. are usually inserted, yet as the bill itself is afterwards set forth in hac verba, they are not absolutely necessary; as was determined in C. B. where in proceedings by bill the like memorandum is used. Trin. 7 & 8 Geo. 2. Atkin v. Worthington un. &c. and in B R. on writ of error from C. B. Mich. 11 Geo. 2. Goostrey v. Reynolds. Andrews 23.

The memorandum was general of Easter term, but the cause of action did not accrue till a day in term; defendant had pleaded in abatement, and a responders ousser had been awarded, after which he demurred for this cause, and then the plaintist moved to amend the memorandum, but the court denied the motion, saying, he came too late, though all was in paper. Burgess v. Periam. Ld. Raym. 324.

The declaration was not delivered four days before the end of the term, defendant pleaded to the jurisdiction of the court, and, as he might by the course of the court, pleaded it within the first four days of the subsequent term. The clerk, to avoid the trouble of making up the post roll, entred it with a special imparlance as of the subsequent term, which spoiled the plea. But the clerks were ordered to make up post rolls, and not to use these special imparlances, which Holt C. J. said, were crept in of late, and were not known somerly. Salk. 367. Vide 2 Raym. 1208.

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In affumpfit, after verdict for plaintiff, a new trial was granted, on payment of costs and bringing the money into court, and the rule was to try the fame issue. The plea roll in that action was of Easter term, and by the memorandum it appeared, that the bill was exhibited in Hilary term before. But on the new trial, the plaintiff did not proceed upon the same roll, but made up the plea roll as of Michaelmas term, and a memorandum of a bill of Trinity preceding. New trial was had, and plaintiff had a verdict again, but it was fet afide for irregularity, the plaintiff not having tried the same cause, as it now appeared to be, and had not purfued the rule for a new trial, which was, to try the same iffue as was tried in the first action. Harpur v. Davy, Carth. 498. and in this case was cited Dubartine v. Chancellour, 5 Mod. 399. Carth. 447. which was trespass. Plea in abatement, demurrer inde, and judgment of respondeas ouster. After which the general iffue was pleaded, and verdict for plaintiff, but set aside for irregularity; because, in the record of nis prius, the plaintiff had omitted all the proceedings on the P 2 plea

Of making up the Issue by Bill.

plea in abatement, and made it up, as if there had been no

fuch plea, but only the general iffue.

Demurrer to a declaration, one exception was, that the action was discontinued, because the declaration was of Michaelmas term, and the plea-roll of Easter, and there is no continuance from Michaelmas to Hilary, and from thence to Easter. Sed non alloc'. Because by the course of the King's Bench they never enter continuances, until the plea comes in, though the declaration was delivered four terms before. Curlewis v. Dudley. Ld. Raym. 872 Salk. 179.

Though it is the practice to make up the issue, and enter it on a roll of that term in which the plea was delivered, yet it has been held, that a plea delivered in one term may be entred as of the subsequent term with an imparlance,

as where

In debt on bond, plea as to part, payment and demurrer inde. On which defendant moved, that the action by the demurrer was discontinued, the plea being only to part, and therefore plaintiff ought to have taken judgment by nil dicit as to the residue. The court were going to give judgment for the desendant, when it was observed, that the plea was of this term, and therefore plaintiff might still take his judgment by nil dicit for the residue. On which desendant alledged, that the plea delivered was of the last term, and therefore the record ought to have been made up so. But the clerks certifying that it being only a plea to enter, the record might be made up either way. Wherefore the court would not order it to be examined, but said there was trick for trick. Markett v. Johnson. Ld. Raym.

It was refolved in Wymarke's case, 5 Rep. 75. That the course of the King's Bench is, [i.e. in suits by bill] that although the plaintiff, after a bar pleaded, have day to reply two or three terms, no mention shall be made in the roll of any imparlance or continuance. But otherwise between the declaration and plea in bar there, if that is of another term, for that shall contain the imparlance or continuance; but no such entry is made upon any replication, rejoinder, &c. Wherefore they shall be intended, when they are generally entred of record, that they were made in the same term in which the bar, &c. was pleaded. And by consequence, here the plaintiff may take advantage of a condition contained in a deed pleaded by detendant with a profest in curia of a precedent term.

Defendants

Of making up the Issue by Bill.

Desendants demanded over of a charter set forth, a copy of which was accordingly delivered to them, after which they put in their plea of nil debet, taking no notice of the over. The plaintiffs made up the issue, and inserted the prayer and eyer at the head of the plea; and demanded to be paid for it. On which the court was moved to expunge it, for though the defendants had a right to fee whether the plaintiffs may fue, yet they are not bound to infert the oyer, but may plead to the merits. And the court held that the defendants were not bound to fet out what they craved over of, but that if the plaintiffs would avail themselves of the letters patent being fet out at large, they ought to do it by praying them to be inrolled at the head of their replication, and ought not to do it at the defendant's expence, and therefore ordered the over to be expunged. The Wear ver's Company qui tam v. Forrest et al'. Stra. 1241.

Upon an issue of nul tiel record, notice of executing a writ of inquiry may be given upon the issue book, as well as upon a joinder in demurrer. Barnes 176. Prast. Reg. C. P. 443. Long v. Lingood. Barnes 249.

Note, the want of a similiter is not added or amendable. Stra. 641.

Of making up the Issue by Original.

WHEN the iffue is by original, it is made up exactly in the same form in both courts, without any memorandum in this manner:

Stormont and Way, (the chief clerk name if in B. R.)

If in C. B. the prothonotary.

Trinity term, [the term in which iffue is joined] in the 20th year of the reign of king George the third.

Middlesex, C. D. late of Westminster in the county of to wit.

Middlesex, gentleman, [according as he is named] was attached, [or summoned as the case is] and so on with the declaration to the end thereof.

And then begin a new line, and enter the pleadings and the award of the venire, observing the entry if the iffue is to be tried in a county palatine, or in case of a Welfb issue, to be tried in the adjacent English county.

P

214 B.R.

Of entering the Jaue.

I f the action is not laid in London or Middlefer, the defendant ought not to give a rule for the plaintiff to enter his issue the same term in which iffue is joined, unless notice of trial has been given. In a country cause the plaintiff is no ways bound to enter his issue the same term it is joined. Praxis U. B. 24. Note on Reg. Mith. 4 Anne. Att. Pract. 201.

But if the action is in London or Middlejex, the plaintiff must enter his iffue, and bring the record into the office within four days after notice of the rule for that purpose. And if in the country before the continuance day of that term on judgment of non pros may be signed. Ibid.

The issue must be delivered to the attorney or agent in town.

Plaintiffs attorney had delivered the iffue, but not going on to trial, defendant's attorney gave him a rule to enter the iffue, and on affidavit made by plaintiff's attorney that the papers were mislaid, the court ordered the defendant's attorney to give him a copy of the iffue, in order to enable him the better to comply with the rule. Wiar v. Smith. Stra. 414.

Of entering the Istue.

ALL issue are to be entred of the term they are joined. Art. Pract. 179. But if not entred of that term, is no reason to set aside a verdict. Prast. Reg. 232.

The plaintiff has four days exclusive of notice of the rule to enter his flue. Pract. Reg. 227. 2 Barnes 257.

If the attorney is not to be found, it may be left in the office, and must be paid for at the defendant's peril. 1

Barnes 166. 2 Vol. Rules and Orders K. B. and C. B. 93.

The issue must be delivered to the attorney or agent in town, and an agreement to deliver it to an attorney in the country is void. 1 Barnes 280.

In trials at bar, copies of the issue are to be delivered to the judges four days before the time appointed for trial, Mich. 3 Geo. 2.

Of Trial.

Of the Notice of Trial, and Trial by Prooffe.

If the venue is in London or Middlefex, and the defendant lives within forty miles of London, there must be eight days notice of trial, exclusive of the day it is given. And if the defendant lives above forty miles from London, there must be fourteen days notice exclusive. Mich. 1054.

Vide the form of notice opposite.

Notice of trial was given the twenty-second of February, which had only twenty-eight days, and rommission day was the 4th of March, and it was good. Per Master Benton in 1771.

By 14 Geo. 2. c. 17. f. 4. where the defendant resides above forty miles from town, no cause shall be tried either at the assizes or sittings in Landon or Westminster, unless notice of trial has been given ten days at least before trial.

And note, that on notices of trial, the distance from London is taken by the computed miles, and not by admea-

furement. Stra. 1216.

If a cause has been four terms after issue joined, and in all cases where there have been no proceedings for four terms, exclusive of the term in which the last proceedings were had, a term's notice must be given before the essential day of the fifth or other subsequent term. Mich. 1654.

A judge's suinmons, if no order is made, is no proceed-

ing; but a notice of trial, though countermanded, is.

Short notice of trial is two days.

It was said per cur. in Harvey v. Porter, I Stra. 211. That upon an old issue, if notice of trial be given before the first day in sull term, it is sufficient, and need not be given before the essign day. But in Bogg v. Rose, 2 Stra. 1164. It was settled (on consideration) that where a term's notice of trial is required upon an old issue, the notice must be given before the essign day, and that is a sull term.

If defendant in any action in London or Middlesex enters a ne recipiatur to prevent the plaintiff from trying his cause at that sitting, the plaintiff may proceed to trial at the ext sitting on notice given during the first sitting. Mich.

Of Trial.

Of the Notice of Trial, and Trial by Provise.

HE fame in this court. Much, 1654. In the Common Pleas, Between \(\begin{aligned} \mathcal{H} & B, & \text{plaintiff,} \\ & \text{and} & \text{c. } \mathcal{D}. & \text{defendant.} \end{aligned} \)

Take notice, that this cause will be tried at the sittings after this present Hilary term to be holden at Westminsterhall, in and for the county of Middlefex, or wherever the cause is to be tried.

Your's, J. M. plaintiff's attorney. Dated, &c. To Mr. O. P. defen-

dant's attorney,

Ó

The same in this court.

Sunday is a day within these notices, unless it is the day on which the notice was given.—So in B. R.

The same in this court, Mich. 1654. Eaft. 13 Geo. 2.

It is faid that a countermand is no proceeding in this court. Short notice of trial is two days. Pract. Reg. 390.

Of the Notice of Trial, and Trial by Provide.

So if notice of trial be given for a day certain in London or Middlejes, and the plaintiff is not ready to proceed, the cause may be tried the next firting on like notice.—Note inde.

And in either case, if the cause be not tried at such next sitting, notice is to be given as at first, unless it be made a remanet, and then no new notice is necessary. Iden.

Notice of trial must be given to the agent or automes in town.

If the defendant proceeds to trial by praviles, he must give like notice in all cases, as the plaintiff would have been obliged to. East. 1651.

No trial can be had by proviso in London or Middlesex, till default made by the plaintiff after the iffue is entred on record, nor in country causes, till the plaintiff has made default in trying his cause the next assizes after the issue entred on record; and in neither case till a rule for trial by provise is entred. Prax. U. B. 24.

There must be a rule for trial by provise. Dodson v. Taylor. 2 Stra. 1055. and a nonsuit was set aside for

want of fuch rule.

At the back of the issue was written, "take notice of trial at the next assizes," and though there was no date or county, or attorney's name mentioned, yet, being indorsed on the back of the issue, the court held it good; but that it would not be so on a separate paper. Henbury v. Rose. Stra. 1237.

It plaintiff concludes to the country, on the defendant's plea, he may give notice of trial on the back of the book; and if the special plea be afterwards waived, and general issue pleaded, the notice which was given for the trial of the special issue, shall serve for the trial of the general issue. Reg. Hil. 8 Geo. 1.

If the defendant does not proceed to trial by provifee, according to his notice, or countermand in time, the plaintiff shall have his costs to be taxed.

Executor or administrator pays costs for not going to

trial pursuant to notice. 4 Burr. 1584.

The court on motion for a new trial held, that the giving notice of trial at the end of half a year after iffue joinOf the Notice of Trial, and Trial by Provise.

The same in this court. Mich. 1654.

The fame in this court. . I Barnes 206.

The fame: 2 Barnes 239. But where upon an old iffue it was given to the attorney in the country, it was held

good. Ibid.

The same in this court. But in London or Middlesex, if no notice has been given for trial, the defendant is not to take it by provise to try it the same term, but afterwards he may take it by provise, giving the like notice as plaintiff ought. Pratt. Reg. 389. Mich. 1654. s. 21.

So if notice has been given and countermanded. I Barnes

211.

And defendant shall not try by provisoe, till there has been a laches in the plaintiff, except in cases where the defendant is as plaintiff, as in replevin, probibition, quare impedit, &c. Ibid. Tr. 2 Geo. 1.

The defendant may try by provise before a whole term

has intervened. Pract. Reg. 397.

The plaintiff cannot continue his notice of trial a second time, i. e. he can give short notice of trial but once; but if the full time be given by the notice of continuance, the word continue will not vitiate the notice. Rich. Att. Pract. C. B. 186.

The plaintiff gave notice of trial for the first sitting within term, then gave notice that he countermanded the notice of trial for the first sitting, and continued it for the second; the desendant made no desence at the trial, and plaintiff had a verdict. But on motion, the court said, that the plaintiff could not countermand and continue at the same time in one notice, and set the verdict aside. 2 Barnes 220. Prast. Reg. C. P. 394. Rep. and Cas. of Prast. C. P. 146.

The fame in this court.

The same in this court.

The defendant gave notice of trial by provise, and the plaintiff also gave notice of trial; neither went on to trial,

Of the Notice of Trial, and Trial by Provisoe.

ed, would prevent the necessity of giving a term's notice, till a year after the last notice, which was given and countermanded. Stra. 531.

Usual notice is sufficient, where the delay for a year after issue joined was by an injunction out of chancery, served at the suit of the desendant. Ruled. 1 Sid. 92:

Or, by the defendant's claiming privilege of parliament,

Ibid.

Notice of trial upon the iffue shall serve for notice of executing a writ of enquiry, if the book is returned with a demurrer. Reg. Hil. 8 Geo. 1. But then the plaintiff ought to give notice of executing the enquiry.

On error in fast the defendant may carry the cause to

trial, without provisoe. Att. Pract. 451.

Note, all the judges on conference agreed, that within the reason of the 4 & 5 W. & M. c. 21. which appoints that the delivery of a declaration against a prisoner to a gaoler shall be good, so notice of trial to him shall be good also, tho the desendant has an attorney in one case, and not in the other. Whitehead v. Barber. 1 Stra. 248.

But of proceedings against prifoners, vide the second Val.

B. R.

Of the Notice of Trial, and Trial by Provisoe.

trial, or countermanded, and both got rules for costs for not going on to trial. The prothonotary doubted whether both were entitled to costs, and the judges were of opinion, that as both sides gave notice of trial, and neither proceeded to trial, each side was entitled to costs. Reading v. Grafton. M. 13 Geo. 1. Prast. Reg. 405.

The same in this court. Hil. 6 Geo. 1.

Note, That if plaintiff gives notice, but does not proceed to trial, whereby costs are taxed for the defendant, and afterwards gives fresh notice [perhaps with design to put the desendant to further costs] yet the court will not stay the trial till the first costs are paid [except in ejectment] because the desendant has remedy for them; and if the plaintiff should not try the cause pursuant to his second notice, the desendant will again have costs, and the like remedy to obtain them. 1 Sid. 279. Andr. 17. Salk. 255. Ld. Raym. 697.

Of the Countermand of Notice of Trial.

Ountermand of trial at the affizes must be in writing, at least fix days before the intended trial, and before commission day. Stat. 14 Geo. 2. c. 17.

So at the fittings in London or Westminster, if defen-

dant resides above forty miles from London. ibid.

If at the fittings, and defendant lives within forty miles of London, then two days before.

If the fittings be on Monday and countermand is made on

the Saturday before, it is sufficient.

A countermand of notice of trial may be given in the country.

The cause was tried upon a day to which it was continued by a second countermand, and the desendant making no desence, the verdict was set aside, it being only in the plaintiff's power to continue his notice once in a term. Green v. Gifford. Stra. 1110.

Every notice of trial, or of executing a writ of enquiry, and all countermands ought to be in writing, and given to the attorney or agent in the cause, and not to the party himself. Say. Rep. 133. Vide the form of countermand of

notice of trial opposite.

If the plaintiff do not proceed to trial, or countermand in time, the court on motion and affidavit of attendance will grant the defendant his costs, occasioned by the plaintiff's neglect to be taxed; and will on motion stay the trial for the nonpayment thereof. Sed vide ante. Ld. Raym. 697. Salk. 255, &c. contra.

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Of

Of the countermand of Notice of Trial.

THE fame in this court. You cannot countermand and continue in the fame notice. Attor. Pract. 186. Plaintiff thould continue it only. Cafes of Pract. C. B. 146.

The fame in this court.

The fame in this court.

The fame in this court. 237. Pract. Reg. 395.

The same in this court. 1 Barnes 215.

Notice may be countermanded, tho' the cause is made a remanes. Pract. Reg. 393;

In the Common Pleas.

A. B. plaintiff,
againft
C. D. defendant.

Take notice, that I do hereby countermand the notice of trial given you in this cause. — Dated, &c. Yours. To Mr. O. P. desendt's attor.

I. M. plaintiff's attor.

In case the plaintiff gives notice of trial, and don't go to trial accordingly, the desendant upon motion shall have his costs of attendance to be taxed by the prothonotary, unless the plaintiff countermand his notice in convenient time, or shew cause to be allowed by the court in excuse of such costs. Mich. 1654.

Of putting off Trial.

ON an application to put off a trial for want of witnesses, there must be notice given of the intended motion, and an affidavit made of the absent witness being a material one, in which the party must swear that he is advised and believes the person to be a material witness; and that he cannot safely proceed to trial without his evidence, and that he has hopes and expectation of procuring the presence of the witness at some suture reasonable time, [specifying it.] Burr. Rep. 4 pt. 1514.

The affidauit regularly must be made by the defendant himself, for no one else can justly swear that the absent person is a material witness. Fort. Rep. 396. Rich. Attor.

Pratt. B. R. 155.

But there may be cases where a third person can swear another to be a material witness, when the defendant cannot; as where a factor sells goods for his principal, and sends them by a porter; here the factor knows the porter to be a material witness, but the principal does not. Vide Barnes 448.

This application to the court must be made two days at least before the day of trial; and an affidavit also of the service of such notice on the opposite party must be then produced and read, or the court will not grant a rule to shew

caufe.

Motion to put off trial which was to be the then next day, motion too late. Barnes 438.

Motion to put off trial must be made at least two days

before the day of trial. Barnes 444.

The affidavit to put off trial on account of the absence of a material witness, is to the following effect:

In the King's Bench. ____ A. B. against C. D.

C. D. of, &c. the defendant in the above cause maketh oath, that I. M. formerly a servant to this deponent [as the case may happen to be] is a material witness for him in this cause, as he is advised and verily believes, and that he cannot safely proceed to trial therein without his testimony: And this deponent further saith, that the said I. M. now is, and for about last past, hath been in the county of L. as this deponent hath been informed, which information he verily believes to be true; but

Of putting off Trial.

in what part of L. he this deponent does not know, nor can at present discover, altho' he hath done his utmost endeavours to find out where he is, in order to serve him with a subpæna to testify for deponent in this cause; but this deponent saith, that he hopes and expects to be able to procure his presence by the first day of next Michaelmas term, because he hath been informed by L. M. [brother to the said I. M.] that the said I. M. will be in London in the month of October next at farthest; which last information deponent also verily believes to be true. Sworn, &c.

An affidavit in common form may be sufficient to put off trial, where no cause of suspicion appears; but where there is cause of suspicion, it may in some cases be necessary to satisfy the court, that the persons absent are really material witnesses; that there has been no laches or neglect to procure their testimony; and that there is a reasonable expectation of their suture attendance. Burr. 4 pt. 1514. Barnes 448.

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So in C. B. motion for putting off a trial, for that a material witness is out of the way, and cannot be had at the trial, must be made at least two days before the day for which the notice of trial was given. Rep. and Cas. of Pract. C. P. 98. 105. 150. Pract. Reg. C. P. 399. 400. Barnes 319. 320. 329.

But if it appears, that this witness who is sworn to be a material witness, went out of town, or abroad, or beyond sea, after the notice of trial was given, the court will not put off the trial for it; as the defendant might have sub-

Affidavit was made by the defendant's wife, that the defendant was gone to sea; and A. B. a material witness as the believed with him.—Affidavit not sufficient. Barnes 437.

If a trial is put off, the practice is only to put it off till next term, and not for a longer period. Barnes 440.

On motion to put off a trial, the court suffered affidavits to be read taken before a vice-consul abroad: Such affidavits are constantly received and read at the counsel-board. It is not reasonable to expect that such sort of affidavits should be taken before commissioners. Barnes 466.

An affidavit to put off trial for absence of a witness must fay when he will return.

BY the 4 & 5 Anne. c. 16. f. 8. It is enacted, "that in any actions brought in her Majesty's courts of record at Westminster, where it shall appear to the court, that it will be proper and necessary, that the jurors who are to try the iffues in any fuch actions, should have the view of the messuages, lands, or place in question, in order to their better understanding the evidence that will be given upon the trials of such issues; in every such case the respective courts in which such actions shall be depending, may order special writs of distringus or habeas corpora to issue, by which the sheriff, or such other officer to whom the said write shall be directed, shall be commanded to have fix out of the first twelve of the jurors named in such writs, or some greater number of them, at the place in question, some convenient time before the trial, who then and there shall have the matter in question shewn to them by two persons in the said writs named to be appointed by the court; and the faid sheriff, or other officer who is to execute the faid writs, shall, by a special return upon the same, certify that the view hath been had according to the command of the faid writs."

And by 3 Geo. 2. c. 25. f. 14. "Where a view shall be allowed in any cause, in such case six of the jurors named in fuch panel or more who shall be mutually consented to by the parties or their agents on both fides; or if they cannot agree, shall be named by the proper officer of the respective courts of King's-Bench, Common-Pleas, Exchequer at Westminster, or the Grand Session in Wales, and the Counties Palatine, for the causes in their respective courts, or if need be, by a judge of the respective courts where the cause is depending, or by the judge or judges before whom the cause shall be brought on to trial respectively, shall have the view, and shall be first sworn, or such of them as appear upon the jury to try the faid cause, before any drawing as aforesaid, and fo many only shall be drawn to be added to the viewers who appear, as shall, after all defaulters and challenges allowed, make up the number of twelve to be fworn for the trial of fuch cause."

As the having a view was not by either of these statutes made a matter of course, though such a practice had prevailed, and had been abused to the purposes of delay, the court thought it their duty to take care, that their ordering a view should not obstruct justice, and prevent the cause

from

from being tried; and they resolved not to order any one more without an enquiry into the necessity of it, unless the party praying it would come into such terms as might prevent an unfair use being made of it; and therefore the judges clearly held, that "the act of parliament meant a view should not be granted unless the court was satisfied that it was proper and necessary;" and they thought it better that a cause should be tried upon a view had by any six, or by sewer than six, or even without any view, than be delayed for a great length of time. Vide Burr. Rep. 4 part. 253, &c.

The rule which was made in a cause then depending, after what the judges had said, was universally approved of, and has been the precedent for like rules for a view since that time. — It was a rule for a view to be had by a special

jury, and was drawn up in these words:

" --- Pierce Efq; v. Earl of Fauconberg, and others."

"By consent of counsel on both sides, it is ordered, that there issue a writ of distringas juratores to be directed to the sheriff of the county of York; in which shall be contained a clause commanding the said sheriff to have six or more of the first twelve of the jurors to be impanelled and returned to try the issue between the parties at the place in question before the time of the trial of the said issue, to wit, upon &c. And that B. R. upon the part of the plaintiff, and I. W. on the part of the desendant, shall attend on the same day and shew the matters in question to the said six or more of the first twelve of the said jurors; and that the expences of taking the said view shall be equally borne by both parties, and no evidence shall be given on either side at the time of taking thereof."

"And by the like consent it is further ordered, that in case no view shall be had, or if a view should be had by any of the said jurors [whether they should happen to be any of the twelve jurors who shall be first named in the said writ or not] yet the said trial shall proceed, and no objection shall be made on either side for want of a view, or that a view was not had by any of the twelve jurors first named, or for that it was not had by any particular number of the jurors named in the said writ, or for want of a proper re-

turn to the faid writ."

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The foregoing rule was made absolute at once, being consented to by both parties; but afterwards there used to be an affidavit always to obtain a rule for a view whether the cause was to be tried by a special jury of a common jury, which the court sometimes made absolute in the first instance, at others they granted rules to shew cause. — But now a motion for a view is become a motion of course without an affidavit.

If the trial is to be by a special jury, the rule runs thus:

"It is ordered, that there issue a writ of * distringas juratores, &c. &c. to the words "taking thereof," in the above recited rule; and the additional clause is in these terms—"The plaintiff [or the desendant, whoever prays the view] consenting that in case no view shall be had; or if a view shall be had by any of the said jurors, whether they shall happen to be any of the twelve jurors who shall be first named in the said writ, or not; yet the said trial shall proceed; and no objection shall be made on either side, on account thereof, or for want of a proper return to the said writ."

If the trial is to be by a common jury, the rule runs thus fince the 3d of Geo. 2. c. 25.

"It is ordered, that there issue a writ of distringus juratores, to be directed to the sheriff of the county of Y. in which shall be contained a clause commanding the said sheriff to have fix or some greater number of the jurors to be impanelled and returned to try the iffue between the parties, who shall be mutually consented to by the said parties, or their agents, at the place in question, before the time of the trial of the faid issue, to wit, upon, &c. And that B. R. on the part of the plaintiff and I. IV. on the part of the defendant, shall attend on the same day, and shew the matters in question to the said fix or some greater number of the said jurors, who shall be mutually consented to as aforefaid; and that the expences of taking the faid view shall be equally borne by both parties; and no evidence shall be given on either side, at the time of taking thereof."

^{*} If in C. B. the words are, " Habeas corpora juratorum, &c. And

And the additional clause added to this rule is as fol-

confenting that in case no view be had, or if a view shall be had by any of the jurors, whether they shall happen to be fix or any particular number of the jurors who shall be so mutually consented to as aforesaid; yet the said trial shall proceed, and no objection shall be made on either side on account thereof, or for want of a proper return to the said writ."

A rule for a view is in the following form:

Gape and I It is ordered, that there iffue a writ of distrin-Smith. S gas juratores to be directed to the sheriff of the county of Essex, and containing a clause commanding the faid sheriff to cause fix or more of the jury impanelled and returned to try the issue between them, whom the said parties shall mutually choose to take a view of the place in question, before the day of the trial of the said issue, to wit, on Wednesday the day of next, and by consent of both parties it is further ordered, that R. D. yeoman, on the part of the plaintiff, and B. L. yeoman, on the part of the defendant, shall attend the same day and shew the said place to such of the jury as shall be so chose to view the same, and that the expences of the faid view shall be equally borne by both parties, and no evidence on either fide shall be given at the time of taking the faid view.

By the court.

Upon the motion of Mr. Erskine.

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Distringas

juratores,
of Great Britain, France, and Ireland, king, defender of the faith, &c. to the sheriff of Sussex

greeting: We command you that you distrain the several persons named in the panel annexed to this writ, the jury summoned in our court before us, between A. B. plaintiff, and C. D. defendant, by all their lands and chattels in your bailiwick, so that n ither they nor any

any one by them intermeddle therewith, until you shall have another precept thereon from us, and that you answer to us of the issues of the same, so that you may have their bodies before us at Westminster on Wednesday after the morrow of All Souls, or before our justices assigned to take the assizes in your county, if they shall first come on Monday the fecond of September at Horsham in your county, according to the form of the statute in such case lately made and provided, to make a certain jury of the country between the parties aforesaid, of a plea of trespass, and to hear their judgment thereupon of many defaults *. And in the mean time, according to the form of the statute in such case lately made and provided, we command you that you have fix of the first twelve of the said jurors, or any greater number of them at the place in question upon the twentieth day of August next ensuing, who then shall have view of the said place in the presence of 7. M. on the behalf of the plaintiff and W. F. on the behalf of the defendant appointed by our court before us to shew the faid place to the faid jurors, and that in what manner you shall execute this our precept, you make return to us at Westminster, and to our justices at the faid affizes, remitting to us this our writ. Witness, &c.

Another form differing from the foregoing at the *.

And in the mean time, according to the form of the statute in this case lately made and provided, we further command yon, that you cause six of the first twelve of the said jurors impanelled and returned to try the issue joined between the said parties, or as many more of them as you shall think sit to take a view of the place in question, on the day of, &c. and that the said jurors meet on the same day at the house of E. F. [as is the rule for the view] in your county, and proceed from thence to view the said place in the presence of J. H. on the part of the plaintiss, and J. K. on the part of the defendant appointed by our court before us, to shew the said place to such of the said jurors as shall

shall come to view the same, and that you make appear to us at Westminster on the said next after in what manner you shall have executed this our precept, and that you have then there this writ. Witness, &c.

Another different form :

We command you, that in the mean time, according to the form of the statute in such case lately made and provided, you have fix or more of the faid jurors, whom the faid 7. G. and 7. S. shall mutually chuse at the place in question, on the day of next ensuing, who shall then have view of the same in the presence of R. R. yeoman, on the part of the plaintiff, and B. B. yeoman, on the part of the defendant, appointed by our court before us to shew the faid place to the faid jurors, and that in what manner you shall execute this our precept, you make return to us at Westminster on the day aforesaid, and to our justices at the assizes aforesaid, in what manner you shall execute this our writ, fending to us this writ, and the names of the faid jurors. Witness, &c.

In the Common-Pleas, the method is the same except that instead of the distringas juratores for a view, their process is the habeas corpora juratorum.

Rule for a view on the face of the declaration (which was for obstructing a water course) denied; 'tis never granted without an affidavit in any case, except an action of waste, Barnes 467.

Of a Witness going abroad, &c.

If a witness be going beyond sea, so that he cannot possibly attend the trial, he may by rule of court be examined before one of the judges of the court upon interrogatories; but notice of the time of the examination must be given to the attorney on the other side, who shall be at liberty also to cross examine him; and the depositions so taken may be read as evidence at the trial.

The interrogatories for the examination of a witness must, when drawn up, be signed by counsel, and the depositions when taken are copied by the judge's clerk, for each party, and shall be read in evidence on the trial of the

cause.

A witness cannot be examined upon interrogatories before a judge without consent. Barnes 447.

The form of interrogatories for the examination of a witness.

Imprimis, Do you know the parties, plaintiff and defendant, in the title of these interrogatories named, or either of them, and which of them, and how long have you known them, either, or which of them? declare.

Secondly, Do you, &c. [and so on putting the questions

necessary for his evidence.]

Interrogatories for Interrogatories to be administered, &c. the defendant. [as before.]

Care must be taken in drawing the interrogatories that the questions are not too leading.

Of Trial by a Special Jury.

BY the 3 Geo. 2. c. 25. f. 15. "Whereas some doubt hath been conceived touching the power of his Majesty's courts of law at Westminster, to appoint juries to be fruck before the clerk of the crown, master of the office, prothonotaries, or other proper officer of fuch respective courts, for the trial of iffues depending in the faid courts, without the confent of the profecutor or parties concerned in the profecution or fuit then depending, unless such issues are to be tried at the bar of the same courts. " Be it declared and enacted by the authority aforefaid, that it shall and may be lawful to and for his Majesty's courts of King's-Bench, Common-Pleas, and Exchequer at Westminster respectively, upon motion made on behalf of his Majesty, his heirs or fucceffors, or on the motion of any profecutor or defendant in any indictment or information for any mildemeanor or information in the nature of a quo warranto depending, or to be brought or profecuted in the faid court of King's Bench, or in any information depending or to be brought or profecuted in the faid court of Exchequer, or on the motion of any plaintiff or plaintiffs, defendant or defendants, in any action, cause, or suit what soever, depending, or to be brought and carried on in the faid courts of King's Bench, Common-Pleas, and Exchequer, or in any of them; and the faid courts are hereby respectively authorised and required, upon motion as aforesaid in any of the cases before mentioned, to order and appoint a jury to be struck before the proper officer of each respective court for the trial of any issue joined in any of the said cases, and triable by a jury of twelve men in fuch manner as special juries have been and are usually struck in such courts respectively, upon trials at bar had in the faid courts; which faid jury, fo struck as aforesaid, shall be the jury returned for the trial of the faid iffue."

By the 24 Geo. 2. c. 18. "The person or party who shall apply for a special jury shall not only bear and pay the sees for striking such jury, but shall also pay and discharge all the expences occasioned by the trial of the cause by such special jury, and shall not have any other or surther allowance for the same upon texation of costs, than such person or party would be intitled unto in case the cause had been tried by a common jury; unless the judge, before whom the cause is tried, shall immediately after the trial certify in open court under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury."

Of Trial by a Special Jury.

And by the same statute, "No person that shall serve upon a special jury, or be returned, shall be allowed or take for such serving on any such jury, more than the judge who tries the cause shall think reasonable, not exceeding 1.6. 1 s. excepting causes where a view hath been directed."

The method of 'ftriking a special jury is as follows:

The sheriff or under-sheriff attends the master of B. R. or prothonotary of C. B. with the book or list of freeholders or persons qualified to serve on juries: And the master or prothonotary, in the presence of the attornies of both parties, names thereout forty-eight, of which twelve are struck out on each side, and the remaining twenty-four are to be returned by the sheriff to try the issue; and if either of the parties shall neglect to attend the master or prothonotary striking a special jury, the master or prothonotary, on behalf of the absent party, shall strike out twelve names. Trin. 8 W. 3. 2 Lil. Pract. Reg. 122. 123. 1 Salk. 405, &c.

On a motion for a special jury, no notice of the motion

or affidavit of the facts is necessary.

Motion in G. B. for a special jury as of course; but before the rule was drawn up the secondary, doubting, prayed the direction of the court: And it appearing that common jury process had been awarded, issued and returned, and that the cause stood as a remanet in the ch. justice's paper, the court resused to grant a special jury: Though in country causes between assizes and assizes, the practice is otherwise. Barnes 461.

So after a venire facias and return filed, the court held the motion for a special jury too late. Clarke v. Sheppard.

Barnes 488.

THE nist prius roll or record contains a full state of all the pleadings verbatim, awards of writs, and other things in the course of the cause, engrossed on a press or sheet of parchment stamped with a double half crown stamp. It is now made up by the attornies, though formerly by the clerks in court.

The nisi prius record, when the suit is by bill in the King's-

Bench, is made up as follows:

PLEAS before our lord the King at Westminster, of Easter term [the term in which issue is joined] in the nineteenth year of the reign of our sovereign lord George the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. and in the year of our Lord 1779.

Roll 800. Stormont & Way.

Surry, to wit, Be it remembered, &c. [copy the whole issue from the plea-roll verbatim to the end of the award of the venire, "the same day is given to the parties aforesaid at the same place," and then enter another placita in this manner:

PLE AS before our lord the King at Westminster, of the term of the Holy Trinity, in the nineteenth year of the reign of our sovereign lord George the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. and in the year of our Lord 1779.

Surry, to wit, The jury between A. B. plain-Jurata. tiff, and C. D. defendant, of a plea of tref- \$ pass on the case [or whatever the action] is respited before our lord the King at Westminster, until Saturday next after the Morrow of All Souls [the first return day after the trial will be had in the country,] unless his majesty's justices, affigned to hold the affizes in the county aforesaid, shall first come on Thursday the 26th day of July at Guildford in the faid county, according to the form of the statute in that case made and provided, for default of the jurors, because none of them did appear. Therefore, let the theriff have the bodies of the faid jurors to make the faid jury between the parties aforesaid, at ? the same place. And be it known, that the writ of our faid lord the King in this case upon record, was

delivered to the undersheriff of the county aforesaid, the 18th day of June [the last day of the term] in this same term, before our lord the king at Westminster, to be executed according to law, at his peril.

If it be a town cause, the jurata will be as follows, omit-

ting the fciendum.

Middlefer, to wit, The jury, &c. [as before to] "unless the king's right trusty and well beloved William Earl of Manssield, his majesty's chief justice, assigned to hold pleas before the king himself, shall first come on the 24th day of June [the day of the sittings when the cause is to be tried] at Westminster-hall in the said county, [or, if in London, at the Guildhall of the said city of London] according to the form of the statute in that case made and provided, the same day is given to the parties aforesaid at the same place.

Note, If plaintiff or defendant have any addition, add it

to the jurata.

When the suit is by original in this court, the nist prius record is made up exactly in the same form as in the Common

Pleas; which see on the Common Pleas side opposite.

In the Common Pleas they make no second placita when they go to trial the same term issue is joined as it would be necessary, since such placita came instead of entering the continuances of vicecomes non missit breve to the venire: but in the King's Bench they always entered this placita, though they went to trial the same term, because anciently they had not business to employ the court every day in term, so that continuances used to be entered from one day to another in the same term.

For the better understanding of the venire distringus habeas corpora juratorum, &c. and the occasion of them, I must refer to Lord Chief Baron Gilbert's History of the Common Pleas, where the subject is fully discussed under the title of jury process.

In the Common Pleas when the suit is not by or against attornies, privileged persons, &c. but by original, the record is ingrossed on a press of parchment, and by Reg.

Trin. 29 Car. 2.

Every record of nisi prius is to be engrossed in a fair legible character, and so entered on the roll; the beginning of every pleading to begin with a new line, and the first word in a greater character than the rest; and in all actions that have divers narrs [i.e. counts] notice thereof must be given by figures in the margin of such record of nisi prius, and all records of nisi prius that shall be engrossed in this court, are to be of the exact breadth of the rolls of the court, and no broader or lesser. Trin. 29 Car. 2.

(prothonotary's name.)

PLE AS at Westminster before Sir William De Grey, knt. and his companions justices of our lord the king of the bench of Easter term, in the nineteenth year of the reign of our sovereign lord George the third, by the grace of God of Great Britain, France, and Ireland, king, defender of the saith, &c.

Roll.

Middlesex, to wit, C. L. late of, &c. gentleman, was attached to answer R. R. of a plea of trespass on the case, and whereupon the said R. R. by attorney complaineth, that whereas, &c. [to the end of the issue and award of the venire.]

Note, The placita is wrote but once, except on the death or change of a chief justice, or on an old record, in which case you write a second placita; then you write the jurata in

this manner:

Middlefex, to wit, The jury between R. R. plaintiff, and G. L. late of, &c. gentleman, in a plea of trespass on the case, are respited here until the morrow of the Holy Trinity, [the return of the habeas corpora juratorum, and which should be the next return after the day of trial] unless Sir William De Grey, Knt. the king's chief justice of the bench here assigned, by form of the statute in such case made and provided, shall come before on Tuesday the day of

[the day of the fittings] at Westminster, in the great half or pleas there, commonly called Westminster-hall, in the said county of Mitalifex, [if in London, say at the Guildhall

When the record is engrossed, you make an incipitur of the issue on a King's Bench roll, with warrants of attorney for the plaintiff and defendant; then take the record roll and the draft of the issue to the clerk of the judgments in the King's Bench office, who will enter it, and mark all three—to whom is paid for entering the issue, if it does not exceed ten sheets, 3s. 6d. and for every six more 1s.

The record being ready to be fealed, it must be carried to the nist prius office (Mr. Way's) in Portugal-street, Lincoln's-inn Fields, where it is examined, sealed and passed, for which is paid 7 s. 6 d. for the first eight sheets, and 7 s. for every eight sheets after, and 6 d. to the sealer.

By a rule of court made in Trinity term, 31 Car. 2. No record of nist prius for the trial of any issue at the assizes, shall be sealed after the end of three weeks after the issuable terms Hilary and Trinity. But now by a judge's order, for which you pay 2s. to the officer, the record may be sealed at any time before the assizes.

The

Guildhall of the city of London aforesaid] for default of the juror, because none came, therefore let the sheriff have the bodies of the several persons mentioned in the panel annexed to the writ of habeas corpora juratorum; and be it known, that the justices here in this same court, in this term, delivered a writ thereupon to the deputy of the sheriff of the county aforesaid, to be executed in form of law, &c.

If the trial is to be had at the affizes, the form of the ju-

rata is as follows:

Lincoln, to wit, The jury between R. R. plaintiff, and C. L. late of, &c. gentleman, in a plea of trespass on the case, is respited here until on the morrow of All Souls, unless our lord the king's justices assigned to take the assign the county aforesaid, by form of the statute in that case made and provided, shall come before on [the day the assigned are to be holden] at [the place where they are to be held] in the county aforesaid for default of jurors, because none came. Therefore, &c. (as before.)

When the suit is by bill in this court, as against attornies officers, privileged persons, &c. the nist prius record is made up exactly in the form of the nist prius record in the King's

Bench by bill. Which fee opposite.

When the nist prius record is prepared, it must be carried and the roll whereon the issue is entred to the proper prothonotary, who, on being paid for the entry, will mark both the record and roll; and then you go to the clerk of the treasury, who will examine and see that the jurata is rightly entered, and sign and seal the record.

No record of nisi prius is to be figned before the iffue is entered upon the roll. Mich. 1654. East. 5 W. & M. And all issues are to be entered of the term they are joined.

East. 5 W. & M. Hil. 11 Geo. 1.

Records of nist prius for trials at the affizes shall be signed by the respective prothonotaries, and signed and sealed by the clerk of the treasury, within the space of three weeks next after the end of every Hilary term, and of every Trinity term, and not afterwards, unless by special order. Tr. 29 Car. 2.

The clerk of the treasury shall not sign or seal any record of nist prist, unless the same shall be first signed or stamped by the clerk of the warrants. Hil. 2. 3. Jac. 2.

The rule of the court of King's Bench is, that while all the proceedings are on paper, all clerical mistakes or omis-

fions may be amended.

If on a plea in abatement a respondens ousler is awarded, and afterwards the defendant pleads in chief, and there is a verdict for the plaintist, yet the plea in abatement must be entered on the nist prius record, or it is good cause for judgment to be arrested: For as it must be entred on the plea-roll (which is in court) so it must be mentioned in the nist prius record, otherwise it will not appear to have been a verdict in the same cause. Carth. 447, 498. 5 Mod. 399: Ld. Raym. 329.

The form of a venire facias in B. R.

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. To the theriff of Middlesex greeting: We command you, that you cause to come before us at Westminster, on next after [fome day of the term in which the iffue was joined, and before the day of trial: If a country cause, the last day of the term] twelve free and lawful men of the * body of your county: [If it be an action on a penal statute, instead of the body of your county fay, " of the neighbourhood of place where the action is laid in the declaration in your county, &c.] each of whom has ten pounds by the year of lands, tenements or rents at the least, by whom the truth of the matter may be the better known, and who are no wife of kin either to A. B. the plaintiff, or to C. D. the defendant [the parties must be described as in the pleadings] to make a certain jury of the county between the parties aforesaid, of a plea of trespass on the case, [or whatever the action is] because as well the said C. D. as the faid A. B. between whom the matter in variance is, have put themselves upon that jury; and have there then the names of the jurors and

^{*} By the 4 & 5 Anne. c. 16. the wenire is to be awarded of the body of the proper county where the issue is triable.

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Of making up the Record for Trial.

The same in this court, agreed by all the judges o' B. R. and C. B. upon examination of all the practicers of the King's-Bench, and prothonotaries of the Common-Pleas. Vide Ld. Raym. 329.

The form of a venire facias in C. B.

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, King, defender of the faith, &c. To the sheriff of Effex, greeting: We command you that you cause to come before our justices at Westminster, on the morrow of the Purification of the bleffed Mary, twelve free and lawful men of the body of your county, each of whom has ten pounds of lands, tenements, or rents, by the year at least, by whom the truth of the matter may be better known, and who are in no ways of kin either to A. B. the plaintiff, or to C. D. late of, &c. or to E. F. late of, &c. [if the defendant be declared against with an alias dict. or as an executor or administrator, he must be here described as in the pleadings] to make a certain jury of the county between the parties aforesaid, in a plea of [as the case may be] because as well the said C. D. and E. F. [the party who first takes the issue as the said A. B. between whom the matter in variance is, have put theinfelves upon the jury, and have there the names of the jurors and this writ. Witnels Sir William De Grey, Kt. at Westminster, the day of in the 19th year of our reign.

[Prothonotary's name.]

Note, If the action is on a penal statute the venire is altered, as in the opposite page.

Vol. I.

If

this writ. Witness William earl Mansfield at Westminster, the day of in the nine-teenth year of our reign.

Stormont and Way.

This writ in B. R. is not figned, but must be sealed, for which 7 d. is paid.

The form of the distringas juratores in B. R.

GEORGE the third, &c. To the sheriff of Middlesex greeting: We command you that you distrain the bodies of the feveral persons named in the panel hereunto annexed, jurors summoned in our court before us, between A. B. plaintiff, and C. D. defendant, by all their lands and chattels in your bailiwick, so that neither they, nor any one for them, do intermeddle therewith, until you shall have other command from us in that behalf, and that you answer to us for the iffues of the same, so that you have their bodies before us at Westminster on Tuesday next after the morrow of All Souls [the next return day after the trial] or our right trufty and well beloved William earl Mansfield, our chief justice, affigned to hold pleas in our court before us, if he shall first come on Monday the 29th day of June at Westminster-hall in the county of Middlesex aforesaid, according to the form of the statute in fuch case made and provided, to make a certain jury between the faid parties of a plea of trespass on the case, and to bear their judgments of many defaults, and have you there the names of the jurors and this writ. Witness, &c. [the return day of the venire.

Stormont and Way.

If in London, the venire and distringus must run thus:
"At the Guildball of the city of London aforesaid." If at
the affizes thus: "Or before our justices assigned to take
the assizes in your county, if they shall first come on
[the first day of the assizes] at [the place where

the affizes are held] in your county, according, &c."
This writ is only fealed, for which 7 d. is paid.

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Of making up the Record for Trial.

If the defendant carries down the cause to be tried by

provifo, the writ runs thus:

And have here the names of the jurors and this writ; provided always, "that if two writs shall thereupon come to you, that you only return one of them to our said justices at Westminster at the time aforesaid."

This writ, the duty of which is 2s. is carried to the prothonotary to be figned, for which he is paid 1s. 4d. and then to the seal office to be sealed, where is paid 7d.

The form of the babeas corpora juratorum in C. B.

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, King, defender of the faith, &c. To the theriff of E. greeting : We command you that you have before our justices at Westminster from the day of Easter in 15 days [the day in bank the next return after the trial] or before our justices assigned to take the assizes in your county, by force of the statute in that case provided, if they shall come before on [the day the affizes are held] at [the place where] in your county, the bodies of the feveral persons named in the panel annext to this writ, jurors summoned in our court before our justices at Westminster, between A. B. plaintiff, and C. D. late of, &c. and E. F. late of, &c. of a plea of taking and unjustly detaining cattle [as the case is] to make that jury, and have there this writ. Witness Sir William De Grey, Kt. at Westminster, the day of in the year of our reign.

[Prothonotary's name]

When the venire is returned, it is carried to the clerk of the jury, who makes out the writ of habeas corpora juratorum, which is carried to the sheriff or his deputy, who returns it.

For filing the venire is paid 4d. babeas corpus, 1s. 8d. duty 4d. and feal 7d.

The venire and distringus are both taken to the sheriffs office of the county, and his deputy returns them, and annexes a panel to the distringus, for which in London is

paid 4s. 6d. in Middlefex 12s.

If the action be by original in this court, you make the venire and distringus returnable ubicunque, or "wheresoever we shall then be in England," put in the defendant's addition, and leave out the word "then" at the conclusion of the writ. The record is made up exactly in the Common-Pleas form.

See the venire and mittimus when the issue is joined in a county palatine, &c. opposite, and in the following pages.

The distringus is amendable; the distringus in debt, was de placito with a blank, and after verdict held amendable. Ld. Raym. 1143. the Venire facial being right.

When the issue is in a county palatine where the King's writs do not run, and must be tried by a jury of the palatinate, the record is sent down by mittimus to the judges to be tried; and the award of the venire and mittimus are in the following form, with a suggestion at the beginning:

Wherefore let a jury be made thereof, and because the iffue aforefaid between the parties above joined ought to be tried by men of the county palatine of Lancaster; that is to fay, of the body of the faid county, where the writ of our faid lord the King doth not run, and not elsewhere: Therefore, to try the iffue aforefaid between the parties above joined, let the record of the plaint aforesaid be fent to his Majesty's justices of the said county palatine of Lancaster; so that the same justices, by his said Majesty's writ of that county to be duly made out, and to the sheriff of the same county directed, do command the faid sheriff that he cause twelve good and lawful men of the body of the faid county of Lancaster, to come before the said justices at their next general sessions of affize to be holden for the said county, after the faid record shall be delivered to them, each of whom, &c. by whom &c. and who neither, &c. to recognize, &c. because as well, &c. And when the verification and iffue aforesaid shall be there made and tried, that then the faid justices shall send the record of the plaint aforesaid, together with every thing that shall be done thereupon before them in his said Majesty's court there, to our faid lord the King at Westminster, at a certain day which the faid juffices shall appoint the faid parties to be in the same court, there to hear judgment thereupon.

The like form in other counties palatine, mutatis mutandis.

The award of a venire on a Welft iffue into the next English county, is in the following form:

In the record on a Welsh issue, the jurata and venire, distribusia, &c. are made up of the next English county into which

the venire is awarded, as if the venue were laid in that

county.

If there are two sheriffs, and one is interested in the cause, or related to either of the parties, the venue should be awarded to the other only, or, if both are interested, &c. to the corner of the county.

A suggestion that one of the sheriffs is interested, &c. by the East India company.

And hereupon the said united company say, that W. S. and R. W. esqrs. are sheriffs of London, and that the said W. S. one of the said sheriffs, in his own right, is proprietor and hath interest in and to a share and proportion of the principal stock of the said United Company, to the value of f., and is a member of the said United Company, and this the said United Company are ready to verify, and for this cause the said United Company pray a writ to be directed to the said United Company pray a writ to be directed to the said R. W. esq; the other sheriff of London, to cause to come twelve, &c. to try the several issues between the said parties, and because the said Francis doth not deny the aforesaid allegation of the said United Company, but acknowledgeth the same, it is granted to them, &c. Therefore let a jury, &c.

Suggestion that the sheriff is of kin to the defendant,

And hereupon the said A.B. says, that J.W. Esq; is sheriff of the said county of E. and that the said C.D. is of kin to the said J.W. in this, that one J.D. junior, son of the said C.D. married and took to wise one J.W. who is yet alive, the daughter of the said J.W. sheriff of the county aforesaid, and for this cause he prays a writ of our lord the king of venire sacias to be directed to the coroner of the said county of E. and because the said C.D. doth not deny the aforesaid allegation of the said A.B. it is granted to him, Sc. Therefore it is commanded to the coroner of the said county of E. that he cause to come here twelve, Sc. Sc.

The sheriffs and coroners of London were interested in the question, and motion was made to shew cause, why a special jury should not be struck and returned by clizors, to be appointed by the court. Per cur'. The special jury

may be moved for of course, after elizors appointed. The first rule was to shew cause, why it should not be referred to the prothonotary, to consider of two fit persons to be elizors, and to report; which rule being made absolute, without opposition, and the prothonotary having named two, the next rule was to shew cause, why they should not be appointed elizors by the court, which was

made absolute, without opposition. Barnes 465.

After issue joined, and before the day of nisi prius, one of the defendants died; plaintiss sued out a ven. fac. between him and the surviving desendant, and made the jurata at the foot of the record of nisi prius agreeable thereto. Verdict for plaintiss; objected at the trial, that the death of the deceased desendant ought to have been suggested on the record of nisi prius, and thereupon an award entred of a venire facias between plaintiss and surviving defendant: The point reserved was argued, and thereupon plaintiss produced the roll in court, whereon the suggestion and award of the ven. fac. as above were entred, which the court held to be sufficient: No continuances are necessary to be inserted in the record of nisi prius. Rule, that plaintiss have leave to enter judgment on postea, and that defendant have time to bring a writ of error, till the day after the next seal in Chancery. Denn ex dem. Lawson v. Farr and another in ejectment. Barnes 469.

Per cur'. It was settled in Sir Peter Delme's case, and has always been the course of the court, that when either party will suggest any special matter about awarding the venire out of the common course, a copy must be given to the opposite party, and they must have a reasonable time to consider it, before you enter a neint desire. Brocas v. Civit. of

London. Stra. 235.

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I F there be occasion, you make out a fubpæna for the witnesses you wish to appear on your behalf.

The form of a subpoena ad testificandum.

GEORGE the third, &c. To A. B. C. D. E. F. and G. H. * greeting : We command you, that all and fingular bufineffes and excuses being laid afide, you and every of you be and appear in your proper persons before our justices assigned to hold the assizes in and for the county of Surry, according to the form of the statute, &c. On Wednesday the fifth day of July next, [the day of the affizes] by nine of the clock in the forenoon of that day at Guildford in the faid county, then and there to testify all and fingular those things, which you and either of you know in a certain action now in our court before us depending between John Banks plaintiff, and Thomas Jones defendant, [if by original, add his addition] of a plea of trespass on the case, [or whatever the action is] on the part of the plaintiff [or defendant, if his witnesses] at the aforesaid day to be tried by a jury of the county, and this you nor any of you are in no wife to omit, under the penalty of each of you of 100%. Witness, &c.

Stormont and Way.

If at the fittings in Westminster, fay "before our right trusty and well beloved William earl Manssield, our chief justice assigned to hold pleas in our court before us on Monday the 24th day of June next, [the day of the sitting] by nine of the clock in the forenoon of that day at Westminster-hall in the county of Middlesex, [or if in London] say at the Guildhall of the city of London.

The pracipe for the officer to make out the subpæna is in this form:

Middlesex, to wit. A subpæna to testify for John Banks plaintist, against Thomas Jones defendant, of a plea of trespass on the case.

R. R. attorney. June, 1779.

^{*} Four witnesses may be put in one fubțana.

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Of compelling the Attendance of Witnesses at.

The form of a subpæna ad tostissicandum in C. B.

EORGE the third, by the grace of God, of Great G Britain, France, and Ireland, King, defender of the faith, &c. To A. B. C. D. E. F. and G. H. greeting: We command and firmly injoin you and each of you, that laying all other matters aside, and notwithstanding any excuse, you be in your proper. persons before our justices at the assizes to be held at in the county of on the first day of August, [the first day of the affizes] next ensuing; to certify and speak the truth in a certain matter of controverfy pending, undetermined in our court before our justices at Westminster, between John Banks plaintiff, and Thomas Jones late of E. in the said gentleman, defendant, in a plea of tresposs [as the action is] and this you are not to omit; nor is any one of you to omit, under the penalty on each of you of one hundred pounds. Witness Sir William De Grey Knight, at Westminster, day of in the 19th year of our reign.

(Prothonotary.)

If the trial be to be had in London, you say, "before Sir William De Grey Knight, our chief justice of the Bench at Guildhall, London, on [the day of the sittings] to testify, &c.

If in Middlesex thus, " before Sir William De Grey Knt. our chief justice of the Bench at Westminster, in the great hall of pleas there called Westminster-hall, to testify, &c.

You pay for figning the fubpana 1s. 8d. fealing 7d. and then you take out a fubpana ticket for each witness to the following purport.

To Mr. Dixon,

By virtue of a writ of subprens to you directed, and herewith shewn unto you, you are commanded perfonally to be and appear before William earl of Mansfield, lord chief justice of his majesty's court of King's Bench on Monday the 15th day of July instant, by eight of the clock in the forenoon of the same day at Westminster-ball in the county of Middlesex, to testify the truth according to your knowledge, in a certain cause now depending, and there to be tried between John Banks, Esq; plaintiss, and Thomas Jones desendant, in a plea of trespass on the case on the part of the desendant, and hereof you are not to sail upon pain of one hundred pounds. Dated the 10th of July in the nineteenth year of the reign of our sovereign lord George the third, king of Great Britain, &c. in the year of our Lord 1779.

J. S. attorney for the defendant.

By the court.

If any person has in his possession any deeds, writings, books of accounts, or other things which it may be necessary to produce on the trial of the cause, or on the execution of the enquiry, he should be served with a subpana duces tecum, commanding him to bring with him and produce the same at the trial of the cause or execution of the enquiry, which subpana is like the former, only you introduce the following words after mention of the place of trial, or of executing the enquiry.

"And also that you bring with you and produce at the time and place aforesaid a certain deed or instrument in writing, bearing date, &c. [describe the thing to be produced] then and there to testify and shew all and singular those things which you or either of you know, or the said deed or instrument doth import of and concerning a certain action now in our court before us depending, &c."

When the fubpana is made out, the duty whereof is as.
it is carried to the proper prothonolary to be figured, for which you pay 1st and to the feal-office to be fealed, for which you pay 7d and then you make out tickets for each of the witnesses in the following form:

Mr. Dixon,

By virtue of a writ of subpæna to you directed, and herewith shewn unto you, you are commanded personally to be and appear before his Majesty's justices of affize [or the chief justice, as before directed, according as the case is] the day of clock in the forenoon of the same day, to testify the truth according to your knowledge, in a certain cause now depending, and there to be tried between A. B. plaintiff, and C. D. late of in the county gentleman, defendant, in a plea of trefof a pals [as the action is] on the part of the plaintiff, [or the defendant, if at his inflance subpæna'd] and hereof you are not to fail upon pain of one hundred pounds. day of in the year of our Lord 1779, and in the year of the reign of our fovereign lord George the third, King of Great Britain, &c.

7. R. Attorney.

Vide the form of subpæna duces tecum opposite : And also

the form of an babeas corpus ad testificandum, post.

The court of Common-Pleas will not grant an attachment against a witness for not attending at the trial, but leave the party to his remedy on the Stat. 5 El. c. o. f. 12. to recover the penalty on such default, Sc. But the court of King's-Bench will grant an attachment.

If a witness should be detained in prison, the following babeas corpus may be had to bring him into court as an evidence; on leaving which with the sheriff or person in whose custody he is detained, you may tender reasonable charges for bringing the prisoner up, or he is not bound to obey the

babeas corpus.

GEORGE the third, &c. To the warden of our prison of the Fleet, greeting: We command you that you have the body of E. M. detained in our prison under your custody as it is said, by whatsoever name he may be charged in the same prison, under fafe and secure conduct before, &c. fas in the subpæna] then and there to testify the truth according to his knowledge in a certain action in our court before us depending, and then and there to be tried between John Banks Esq; plaintiff, and Thomas Jones desendant, in a plea of trespass on the case, on the part of the plaintiff; and immediately after the said E, M. shall have then and there given his testimony before the said chief justice, for before the faid justices] to return him the faid E. M. to our faid prison under the like fafe and secure conduct, and have then there this writ. Witness, &c.

Storment and Way.

A pracipe is made for this writ; when made out get it figned, for which you pay in term 6 s. 8 d. in vacation 7 s. 8 d. and fealing 7 d.

A prisoner in execution cannot be brought up. Vide

Comb. 17. 48. Sed vide poft.

The party, at whose instance a prisoner is brought, by virtue of an bab. corp. ad test. in order to his being examined and giving his testimony on his behalf at a trial, must take care that there be a good and sufficient guard with the witness; for the danger of the escape of the prisoner will be at the risque of the party who brings him up: The charge of which, and also of his being carried back again, must be borne by such party. Style. Rep. 128. 230. Treton v. Squire. See ibid. 119. 126.

In B. R. a general rule was made by the court, that no hab. corp. ad testissicandum, of either side civil or crown, should be granted without an affidavit, that the prisoner to be

brought up, is a material witness.

Eyre just. said, he never granted such habeas corp. in a civil case, at his chambers, without such an affidavit; and

agreed, that a judge might grant the writ at his chambers on affidavit, and that in a civil case security is sometimes given. The King v. Layer. Fort. 396. 3 Burr. 1440. S. P.

The plaintiff moved for an hab. corp. to bring two prifoners in the Fleet, both charged in execution, to Guildhall, to testify in a cause upon an affidavit of their being material witnesses; and a rule was made to shew cause why it should not be granted, or why the witnesses should not be examined upon interrogatories, and their depolitions read, the plaintiff indemnifying the warden. But for want of the confent of the defendants and the warden, the rule was difcharged. Barnes 222. The fingle point of law is, Whether under such hab. corp. (the prisoners being in execution). the warden could not defend himself against an action for an The last time this question was before all the judges, seven against five were of opinion, that the bab. corp. would not excuse the warden, but he would be liable to answer for an escape. Vide Barnes 222, and authorities there cited.

The affidavit to be made must be made by the party ap-

plying for the hab. corp. Fort. 396.

And the party must swear that the prisoner is also ready to come to testify. Per cur. B. R. The last day of Hil.

term 1780.

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Witnesses ought to have a reasonable time to put their own affairs in such order, that their attendance upon the court may be of as little prejudice to themselves as possible; and the court of B. R. held, that notice at two in the afternoon in the city, to attend the sittings that evening at West-

minster, was too fort a time. Stra. 510.

No witness is obliged to attend, unless his reasonable expences are tendered him by the party wanting his testimony. [Vide the Stat. 5 El. c. 9.] And the court of B. R. upon motion for an attachment against a witness for disobeying a subpæna served at Chester, to attend the sittings at Guildhall, held, that a tender of two guineas for his expences was too little, saying, that a witness is not obliged to trust to the court's allowing him more when he comes to the book; for perhaps the party may not call him, and then it may be difficult for him to get home again. 2 Stra. 1150:

The court of B. R. will not grant an attachment against a witness, if he was not personally served; without personal service, it is not sufficient to warrant a proceeding criminally against him, whatever it might do in an action.

Stra. 1054.

Of entering the Cause for Trial.

Of entering Town Caufes.

If the cause is to be tried in London or Middleser within the term, it must be entered in the Marshal's book, which is kept at the chief justice's chambers two days before the sitting, otherwise a ne recipiatur may be entred by the desendant. Hil. 15 & 16 Car. 2.

In Middlesex, no record of nist prius will be received at any fittings after term, unless the same shall be delivered to and entered with the marshal within two days after the last

day of every term.

And in London, no record of nisi prius will be received at any sitting after term, unless the same shall be delivered to and entred with the marshal the day before the day, to which

the fittings in London shall be adjourned.

If the cause is to be tried at the sittings after term, a ne recipiatur cannot be entered until after proclamation made by order of the chief justice for the attornies to bring in their records; and then if the record be not brought in a

ne recipiatur may be entred.

Every cause to be tried at niss prius in London and Middlefex, shall be tried in the order on which it was entred, beginning with remanets, unless it shall be made out to the satisfaction of the judge in open court, that there is reasonable cause to the contrary, who thereupon will make out such order for the trial of the cause so put off, as to him shall seem just. Notice given by the clerk of niss prius. Mich. 17 Geo. 2.

In a town cause you pay for entering the cause 115. 8 d.

viz. to the chief justice 6s. 8d. marshal 4s. and cryer 1s.

If the plaintiff be hindered from trying his cause by the defendant's entring a ne recipiatur, the plaintiff may try it the next sitting, if in London or Middlesex, upon giving notice to the defendant or his attorney on the day of the setting, on which it should have been tried, before the rising of the court. Mich. 4 Anne.

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Of entering the Cause for Trial.

Of entering Town Caufes.

IN this court the cause by Reg. Mich. 1654. ought to be entered four days before the sitting; but now it is the practice, tho' there is no rule to warrant it, two days are sufficient, otherwise a ne recipiatur may be signed.

The fame in this court. By Reg. Eaft. 2 Geo. 3.

The same in this court. Ibid.

No ne recipiaturs shall be allowed to be entred for the sattings at nist prius after every term, unless the records of nist prius and the writs be made up and brought into court on or before the days and sittings respectively. Hil. 8 Geo. 1.

The same in this court. By rule Hil. 14 Geo. 2.

In a town cause you pay for entering the cause 13s. 9d. viz. to the chief justice 10s. 9d. marsbal 2s. associate 1s.

The fame in this court.

In like manner, if notice of trial be given for a day certain in London or Middlefex, and the plaintiff is not ready on that day to proceed to trial, the cause may be tried the next sitting, upon giving like notice, as where a ne recipiatur is entred by the desendant. But in either case, if the cause be not tried at such next sitting, notice is to be given as at first, — so in B. R. unless it is made a remanet, and then new notice need not be given.

Of entering the Cause for Trial.

Of entering causes at the affizes.

In every cause to be tried in the circuits, the writ and record shall be entred together, and no record shall be re-

No writ and record of nist prius shall be received at the affizes in any county in England, unless they shall be delivered to and entered with the marshal, before the first sitting of the court after the commission day, except in the counties of York and Norfolk, and there the writs and records shall be delivered to and entred with the marshal before the first sitting of the court, on the second day after the commission day, otherwise they shall not be received. Hil. 14 Geo. 2. And all causes are to be tried in the order they are entered, without presence or delay, unless otherwise ordered by the judge, &c.

At the affizes for entering the cause, the like sum is paid

as in the Common Pleas. Vide opposite.

Note, if the cause is made a remanet, application must be made to the associate for the record, to which are annexed the venire, distringus, and panel. Then make the proper alterations in the returns, and day of the fittings therein; then carry the record to the nist prius office, to be resealed; and the venire and distringus to the seal office, where is paid for resealing each one penny; then annex them together, and leave them again with the associate, to whom is paid 5s. for making it a remanet.

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Of entering the Cause for Trial.

Of entering causes at the affizes.

The same in this court. 10 & 11 Geo. 2.

The like rule in this court. Hil. 14 Geo. 2.

At the affizes for entering the cause is paid 11s. 8d. viz. judge 6s. 8d. clerk of affize 2s. marshal 2s. and cryer 1s.

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And note on trials by provisoe, where the plaintiff and the defendant both carry down the record, at the same time the trial shall be on the plaintiff's record, if he enters it with the marshal; but if he refuses or omits to enter it, the defendant may proceed on his record.

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the called the dealer of the great sections.

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Of Trials at Bar.

A LL issues to be tried at the bar are to be tried by a special jury, struck by the master of B. R. or prothonotary of C. B. which is in this manner: The sheriff attends the master or prothonotary with the book or list of freeholders, or persons qualified to serve on juries; and the master or prothonotary, in the presence of the attornies of both parties, names thereout forty-eight, of which twelve are struck out on each side, and the remaining twenty-four are to be returned by the sheriff to try the issue; and if either of the parties shall neglect to attend the master or prothonotary, on striking a special jury, the master or prothonotary, on behalf of the absent party, shall strike out twelve names. Trin. 8 W. 3. 2 Lill. Prast. Reg. 122, 123. 1 Salk. 405, 625, 648, 649, 651. 8 Mod. 245, 248. 2 Jones 222. Stat. 3 Geo. 2. c. 25. s. 15, 16, 17.

A trial at bar is seldom allowed by the court to be in an iffuable term, unless the crown is actually concerned in the

intereft. And. 271, 273.

A second rule cannot be made for a trial at bar, between the same parties in the same term, nor can it be in an issuable term. East. 4 Geo. 2. B. R. Fitzgib. 267. Sed vide a Barnes 370.

Every trial at bar, where the proceedings are by original, must be on the quarto die post, after the return of the venire.

Sed 2.

Trial at bar must be moved for in court, and the day is always appointed by the court; but yet the plaintiff is at liberty to countermand the notice of trial, and to prevent the cause being tried on that day, which if he does, it cannot be again brought to trial, unless some day be ap-

pointed by the court.

The plaintiff's attorney must, before the essoign day of the term in which the cause is appointed to be tried, give notice to the chief prothenotary or his secondary, of the day on which the cause is to be tried, that the same may be put down in the court book, and in case of neglect, and without motion and special direction of the court, such cause shall not be tried that term. Hil. 9 Ann. in C. B.

On trials at bar, the lord chief justice and other judges are to have copies of the issues in such causes delivered to them four days before the time appointed for trial. Mich.

3 Geo. 2.

After a trial at bar, the court will not grant a new trial, unless it appears that there has been some corruption or misbehaviour

Of Trials at Bar.

missehaviour in the jury. Carth. 507. But after a trial at bar upon issues out of Chancery a new trial has been granted, as they were only to satisfy the conscience of the chancellor, and not stricti juris. Ld. Raym. 514. Salk. 648. Carth. 507. Holt 702.

Note, a cause cannot be tried at bar, where the action is laid in London, by reason of their charter. 2 Salk. 644.

The court won't grant a trial at bar till issue is joined, because it would be infra dignitatem to grant it till they knew whether the issue joined would be a matter of difficulty or not. Case of the Borqueh of Christ Church, Stra. 696,

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Df a Monspros.

THE plaintiff may be non-profied at any stage of the suit for non-compliance with the rules and orders of the court, — viz. for not declaring in the limited time, — not replying to the defendant's plea, — not surrejoining to his rejoinder, — not entering the issue when served with a rule within the time for that purpose, allowed, &c.

When a judgment of non-pros is figned, the plaintiff becomes liable to pay the defendant the costs he has been put

to-pro falso clamore.

A non-pros is in the nature of final judgment, and is figned in the fame manner.—The plaintiff however may bring his fresh action on the very same ground of complaint; but the court will not suffer the plaintiff to hold the defendant to special bail * a second time for the same cause of action, and will, on application, stay the proceedings in the second action till the costs of the former non-pros are paid. Sed 2. For the defendant has his remedy by action for the costs of the non-pros.

If the defendants sever in their plea, the plaintiss may, at any time before the record is sent down for trial, enter a non-pros against one or more of them. Salk. 457.—Vide the difference between non-pros and a retraxit. Ante title

Non-bros.

If a non-pros is figned irregularly, the plaintiff may proceed to judgment, — as where defendant pleaded a tender, but brought no money into court, gave a rule to reply, and for want of a replication, figned judgment of non-pros. The plaintiff looking on the plea as a nullity, for want of the money in court, figned judgment after the non-pros obtained, which the court held to be regular, and fet afide the non-pros. Barnes 252.

^{*} Sed wide ante title Non-pros for not declaring.

Df a Monsuit.

Of Judgment as in Case of a Nonsuit for not proceeding to Trial.

Y 14 Geo. 2. c. 17. it is enacted, That " where any B iffue is, or shall be joined in any action or suit at law in any of his majesty's courts of record at Westminster, the court of Great Seffion for the principality of Wales, the court of Great Session for the county palatine of Chester, the court of Common Pleas for the county palatine of Lancaster, or the Court of Pleas for the county palatine of Durham; and the plaintiff or plaintiffs in any fuch action or fuit hath or have neglected, or shall neglect, to bring such issue on to be tried according to the course and practice of the said courts respectively, it shall and may be lawful for the judge or judges of the faid courts respectively, at any time after such neglect, upon motion made in open court (due notice having been given thereof) to give the like judgment for the defendant or defendants in every fuch action or fuit, as in cases of nonfuit, unless the said judge or judges shall, upon just cause and reasonable terms, allow any further time or times for the trial of fuch iffue; and if the plaintiff or plaintiffs shall neglect to try such issue, within the time or times so allowed, then, and in every such case, the faid judge or judges shall proceed to give such judgment as aforefaid."

And by fest. 2. "All judgments given by virtue of this act, shall be of the like force and effect as judgments upon nonfuit, and of no other force and effect."—Provided also, "that the defendant or defendants shall, upon such judgment be awarded his, her, or their costs in any action or suit, where he, she, or they would, upon nonfuit, be entitled to the same, and in no other action or suits whatsoever."

On application to the court for judgment, as in case of a nonsuit on this statute, * notice must be given of the motion, and an affidavit had of the state of the proceedings, and of plaintist's default in proceeding to trial, and also of the service of the notice of the motion; upon reading of which affidavit, and of the entry of the issue upon record,

^{*} The motion held to be notice within the act. Left. 265.
S 3 [which

Of Judgment as in Case of a Nonsuit for not proceeding to Trial.

[which must be brought into court for that purpose] the court will make a rule for the plaintiff to shew cause why the like judgment should not be given for the desendant as

in cases of nonsuit.

The rule nist for judgment unless cause shewn is made out for the next day, when desendant must move by counsel to make the same absolute [having an affidavit of the service of the rule nist] and if no sufficient cause is shewn to the contrary, or the plaintist do not undertake to try his action within the time the court shall think proper to allow him, which is always made a part of the rule, it will be made absolute; and the desendant, having drawn up his rule, may sign the judgment of nonsuit, tax his costs, &c.

Notice of motion for judgment as in case of a nonsuit;

Take notice, that this honourable court will be moved on next, or as foon after as counsel can be heard, that the like judgment be awarded for the defendant herein, as in case of a nonsuit for default of the plaintiff, in not proceeding to trial in due time after issue joined. Dated, &c.

Your's,

I. M. (defendant's attorney.)

To Mr. O. P. plaintiff's attorney.

The affidavit of plaintiff's not proceeding, &c.

I. M. of &c. attorney for the above named defendant, maketh oath, that iffue was joined in this cause in Trinity last, and that the plaintiff did not proceed to trial at the then next assizes for the county of Surry [in which said county the venue in this cause is laid] which, according to the practice of this court he might

Of Judgment as in Case of a Nonsuit for not proceeding to Trial.

might have done. And faith, that he this deponent did, on the fixth day of December last, serve a true copy of the notice, hereunto annexed, upon Mr. O. P. who acts as attorney for the plaintiff in this cause, by delivering the same to a clerk of the said Mr. O. P. at his chambers in Coney-court, Gray's-inn, Holbourn.

Sworn, &c.

I. M.

It is faid in Sayer Rep. 12. That judgment as in case of a nonsuit, ought not to be given unless all the defendants apply for it. — S. C. in 1 Wils. 325. — Sed quare?

Executors and administrators pay costs for not going on to trial pursuant to notice given by them. Burr. Rep. 4 pt. 1585. — So of a non-pros; — but they do not pay costs if nonsuited at the trial. Cro. Fac. 229.

A rule nist in a qui tam action for like judgment, as in case of a nonsuit, was made absolute, no cause being shewn.

1 Wilf. 225.

Motion for like judgment as in case of a nonsuit, and that the master should tax the costs for not going to trial according to notice, not countermanded, refused; for costs in both cases, being founded on different rights, ought not to be blended together. Earl of Leicester v. Wooden. Mich. 21 Geo. 2.

But if the court, on shewing cause against the judgment of nonsuit, grants plaintiff further time, it is always on payment of costs for not proceeding to trial, unless notice

thereof was countermanded in time. ibid.

In C. B. motion that the iffue roll might be brought into court, and for judgment, as in case of a nonsuit purfuant to the act. — Per cur. A rule must first be given for plaintiff to enter the issue on record; which if he fails to do, the defendant may sign a non-pros for want thereof. — If the plaintiff enters the issue, the roll must then be produced in court; and thereupon the desendant may move for like judgment as in case of a nonsuit, according to the act. Digges v. Price. Barnes 313.

Note, If the cause shewn by the plaintiff is sufficient to discharge the rule to shew cause, &c. the court will appoint a suture day for the trial; in country causes, at the next assistes, — in London or Middlesex at a sitting at a convenient

distance. ibid.

Of Judgment as in Case of a Nonsuit for not proceeding to Trial.

Defendant applied for and had costs for plaintiff's not proceeding to trial; and afterwards moved for judgment as in case of a nonsuit, - but the motion was denied. - Per cur. He has made his election of one remedy and cannot have the

other. Barnes 316.

Defendants obtained a rule to shew cause why judgment as in case of a nonsuit, &c. — And the plaintiff had a rule to shew cause why he should not have leave to discontinue, both came on together. - And per cur. The application for leave to discontinue after the first motion is wrong. - Rule

made absolute for judgment. Barnes 316.

Iffue joined and notice of trial given, but a mistake in the declaration being discovered plaintiff did not proceed. Defendant applied for judgment as in case of a nonfuit. The court on shewing cause gave leave, as the issue roll was not struck into the bundle, and the amendment small, to amend on payment of costs and for not proceeding to trial. Barnes

Two of plaintiff's material witnesses were disabled by the gout, &c. from attending the trial. - On shewing cause why judgment should not be entered as in case of a nonsuit, it was held a sufficient excuse; and the court ordered the plaintiff to try it at the next affizes peremptorily, on payment of costs for not proceeding to trial at the last affizes only. Where the excuse is sufficient, the court do not give costs of the application, aliter where it is insufficient. Barnes 316.

After peremptory order for trial, rule for shewing cause why judgment as in case of a nonsuit discharged, the court is not precluded from a farther enlargement of the time if they think it reasonable. The second excuse may be better than the first, and the statute is founded on neglects. -Vide the case of Milton & al assignees v. Terrill. Barnes

Plaintiff's own illness allowed a sufficient cause to pre-

vent judgment, as in case of a nonsuit. Barnes 313.

In an action against two, there was judgment against one by default, and rule for judgment for the other, as in case of a nonfuit, yet he cannot have his costs taxed as in case of a nonfuit; because the case of a nonfuit does not here exist; for if the plaintiff be nonfuited, he must be out of court as egainst both desendants, whereas he hath obtained judgment against one of them. Burr. 4 pt. 359, Sayer 142.

Of Judgment as in Case of a Nonsuit for not proceeding to Trial.

In replevin, the court of King's-Bench held that defendant ought never to have judgment as in case of a nonsuit; because, as he himself is an actor, he might have tried the Sayer on costs 142. caufe.

But the Common-Pleas held otherwise, and said the act of parliament had made no distinction, though the defendant might carry down the record to trial. Bentley v. Scott and

another, in replevin. Barnes 317.

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Motion that the defendant might be at liberty to enter up a nonfuit, upon an affidavit that plaintiff did not appear at the trial; but denied, and per cur. a nonfuit cannot now be recorded here in bank, it ought to have been recorded by the judge of nisi prius. Gardner v. Davis. 1 Wilf. 300.

At nist prius the cause was called and jury sworn; but no counsel, attornies, parties, or witnesses, appeared on either side. Per Pratt, ch. ju. The only way is to discharge the jury, for no body has a right to demand the plaintiff but the defendant; and therefore the defendant not demanding

him, I cannot order him to be called. 1 Stra. 267.

The record was offered to be entered at last affizes a little out of time, and defendant's attorney then present had refused to consent that it should be received. Afterwards defendant moved for judgment as in case of a nonsuit; but the court ordered the plaintiff to pay costs for not proceeding to trial, and peremptorily to try at the next affizes. Barnes 464.

The defendant in replevin carried down the record, but plaintiff not appearing at the affizes, the defendant's counsel infifted strongly on a verdict, which was complied with; but upon plaintiff's application to fet aside the verdict, the court, after hearing the judge's report, ordered the postea to be amended, and a nonsuit to be returned instead of a verdict for the defendant, and that he should pay the costs of the motion. Barnes 458.

Of nonfuiting at the Trial.

A Plaintiff may be nonfuited after trial, and before verdict, by absenting himself from the court, or not appearing therein by himself or his counsel, when the jury return back to the bar to give in their verdict, upon the matter of fact submitted to their decision. The plaintiff has his advantage in this, rather than suffer a verdict to be given against him upon the merits.—For after a judgment of non-suit, he may bring another action upon the very self same ground of complaint, which he cannot do after a verdict against him upon the merits.

In an iffue out of Chancery on a motion for a new trial, because the desendant had produced evidence by surprise, which the plaintiff, if prepared, could have answered; one main reason for denying the motion was, that the plaintiff suffered a verdict to be given, when he might have been nonsuited; which I mention as a caution in cases of the like kind. Bull. Ni. Pri. 326. Richards v. Syms 1742.

By the old law no verdict could be given in the absence of the parties, and therefore when the jury returned to the bar to deliver their verdict, the plaintiff was bound to appear in court, in order to answer the amerciament, to which he was formerly liable, if he failed in his suit. And tho' this amerciament is disused, yet the form in the pleadings still continues the same, and his appearance in court in person or by attorney is as necessary now as formerly, before the jury can deliver their verdict.

When therefore a plaintiff or his council imagines that fufficient evidence has not been given to maintain the iffue on his part, and apprehending a verdict likely to be given against him, it is usual for him to be voluntarily nonfuited by withdrawing himself, whereupon the crier is ordered to call the plaintiff, and if neither he nor any one for him appears, he is then said to be nonfuited, the jurors are discharged, the action is at an end, and the defendant recovers his costs.

If a nonfuit is regular, the parties are out of court, and it cannot be fet aside; if irregular, it is not considered as a nonfuit.

Of Arbitration.

Of referring Causes to Arbitration; and herein of Disobedience to the Award.

If the parties to a suit enter into a bond to each other, with a penalty, conditioned to submit and stand to the award of arbitrators, and such condition is not made a rule of court (as it may), if the award is properly made, and is not performed, the party refusing to perform it forseits the penalty of the bond, and the same may be recovered at law;

but no attachment can go against him.

But by the Stat. 9 & 10 W. 3. c. 15. reciting, " that whereas it hath been found by experience, that references made by rule of court have contributed much to the ease of the subject, in the determining of controversies, because the parties become thereby obliged to submit to the award of the arbitrators, under the penalty of imprisonment for their contempt, in case they refuse submission; now for promoting trade, and rendering the awards of arbitrators the more effectual in all cases, for the final determination of controversies referred to them by merchants and traders or others, concerning matters of account or trade, or other matters; "Be it enacted, &c. that it shall and may be lawful for all merchants and traders, and others defiring to end any controversy, suit or quarrel, controversies, suits or quarrels, for which there is no other remedy, but by personal action or fuit in equity, by arbitration, to agree that their fubmission of their suit to the award or umpirage of any person or persons should be made a rule of any of his majesty's courts of record which the parties shall choose, and to infert fuch their agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons; which agreement being so made and inferted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an offidavit thereof made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule of court, and reading and filing the faid affidavit in court, be entered of record in such court, and a rule shall thereupon be made by the faid court, that the parties shall submit to and finally be concluded by the arbitration or umpirage which shall be made concerning them

Of referring Causes to Arbitration; and herein of Disobedience to the Award.

by the arbitrators or umpire, pursuant to such submission; and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court, when he is a suitor or defendant in such court, and the court on motion shall issue process accordingly, which process shall not be stopped or delayed in its execution, by any order, rule, command or process of any other court, either of law or equity, unless it shall be made appear on oath to such court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration or umpirage was procured by corruption, or other undue means."

And by sect. 2. Be it enacted, &c. "That any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the

parties."

The court of B. R. held that on this statute "they could not receive any complaint to set aside an award, till the submission was made a rule of court, and that a consent in the submission bond to make the award a rule of court, instead of the submission, would not warrant their interposing. Harrison v. Gundry. Stra. 1178. Sed vide post.

Also the court will compel a witness to make an affidavit of the execution of the bond or agreement. Clark v. Elwich.

Stra. 1. Singleton v. Bradly. Hil. 6. Geo. 2.

For on motion the court made a rule, that A. B. a subscribing witness to an arbitration-bond, should shew cause why he should not make an affidavit touching the execution of the bond, which was made absolute on affidavit of service.

Barnes. 58.

Also it has been adjudged, that an attachment for non-performance of an award cannot be granted on the affirmation of a quaker; for though it is a full between party and party, yet an attachment is a criminal profecution within the proviso of the fixth sect. of 7 & 8 W. 3. c. 34.

Of referring Causes to Arbitration; and herein of Disobedience to the Award.

Also that a parol award is no award, and cannot be carried into execution. Hichman v. Hather. C. B. Mich. 4 Geo. 1. King's Rep. 115. Sed vide Salk. 75.

A parol award held good, and an attachment granted for non-payment of the money pursuant thereto. Rawling v. Wood. Barnes 54.

And that this statute does not extend to partition of

lands. King's Rep. 58.

Per Cur. The act of 9 & 10 W. 3. for determining differences by arbitration, was made to put submissions where no cause was depending in court, upon the same foot with those where there was a cause depending; and it is only declaratory of what the law was before in the latter case. Bur.

4 pt. 701.

A submission was to an award by bond; and in the end of the condition of the bond was this clause, " And if the obligor shall consent that this submission shall be made a rule of court, that then, &c." On motion to make this submisfion a rule of court, and on cause shewn against it, as the party would rather have forfeited the penalty, the court held these conditional words to be a sufficient indication of confent, and made the award a rule of court. Salk. 72. Ld. Raym. 674. S. C.

Rudd v. Coe. Motion on behalf of Rudd, that a submisfion between the parties contained in the condition of arbitration bonds might be made a rule of court; and the bond was produced executed by Coe. Per cur. Be it fo: Coe's consent is shewn by the bond executed by him; and the

motion is made on behalf of Rudd. Barnes 55.

Motion to make a submission a rule of court, pursuant to the stat. 9 & 10 W. 3 .- Objection, that the agreement to make the submission a rule of court was no part of the condition, but was there under written, and not figned; but it appearing by affidavit, that the subscription was made before the execution of the bond, it was taken by the court: to be part of the submission, as an indorsement, by way of defeasance, is part of the deed; and the submission was made a rule of court. Carter v. Mausbridge. Barnes 55.

A matter was referred, by rule of court, to the determination of the judges of affize; and then it was moved, that the judges determination might be made a rule of court. Per Holt, ch. just. Where a matter is referred to arbitrators, by rule of court, and they make their award, we will compel

Of referring Causes to Arbitration; and herein of Disobedience to the Award.

a performance of it as much as if the award were part of the

rule; fo that a new rule is needless. Salk. 71.

Per Holt, ch. just. et totam curiam. No reference whatsoever, of any cause depending in this court, should stay the proceedings of this court, unless it was expressed in the rule of reference, to be agreed, that all proceedings should stay. Ld. Raym. 789.

Upon an award, made a rule of court, the party may proceed both by attachment and action at the same time. I Keb.

130, 138. Salk. 73.

If a cause at nist prius, in London or Middlesex, is referred by consent, application must be made to the clerk of nist prius, for the order of nifi prius-and the respective attornies should set down the names of the witnesses, proposed to be examined on the reference, on a piece of paper, and deliver the same to the crier, who, at his leisure, will swear them at the bar of the court, for which he is paid 2 s. every witness. If the witnesses are not sworn in court, they must attend a judge to be fworn.

If on the circuit a cause is referred, the associate draws up

and enters the order of nisi prius for that purpose.

When the arbitrator has appointed the time and place to arbitrate the matters in dispute, (which should be in writing) it is usual for the plaintiff's attorney, when he has obtained it, to subscribe it to the copy of the order of reference sewed on the defendant or his attorney; and then the attornies on both fides should deliver to the arbitrator short briefs of their clients case, with the names of the witnesses sworn to be examined, with all necessary papers, &c.

The defendant's attorney must be served with a true copy of the order of reference, and the arbitrators appointment thereon, in case it should be necessary that an affidavit be

made thereof.

The arbitrator may adjourn from time to time, if the matter is long or intricate, fo as he makes his award withen the time prescribed in the order,—but, if that cannot be done in the limited time, either party may, on motion and affidavit of having given notice thereof to the other fide, procure a rule of court for a further enlargement of time; which if granted, the party, on whose motion the rule was made, draws the same up with the clerk of the rules in B. R. or fecondary in C. B. a copy of which must be served on the arbitrator,

Of referring Causes to Arbitration; and herein of Disobedience to the Award.

arbitrator, who, on appointing another time to hear the parties, &c. the attorney must give another copy of the last mentioned rule, with the appointment thereon, to the op-

posite side.

When the award is made, the arbitrator, or his attorney, should give notice to the attorney on each side, that the award is ready for delivery, and that each of the litigants may have his part, on paying for the same. If the party, in whose favour the award is made, accept his part thereof; and the other, against whom it is given, refuses to accept his; the arbitrator should tender, or cause to be tendered, that part of the award to him, in order that a rule of court may be obtained, on an affidavit made of such tender and refusal, to make the order of niss prius a rule of court; a copy whereof must be served on the party refusing to accept such award.

If the party does not obey the lastmentioned rule within the time therein expressed, the party who obtained such rule may, on an affidavit made of having personally served the offending party with a copy of such rule and of disobedience thereto, move the court for an attachment against

him; which will be ordered accordingly.

This rule for the attachment must then be carried to the Crown-office in the Tomple, and the attachment there bespoke, for which 13s. 4d. is paid: Which being obtained, the attorney must then get a warrant thereon from the sheriff (at his office) of the county wherein the party to be attached resides, and execute it accordingly. It is discretionary in the court to grant process of contempt for not executing an award. Stra. 695.

Whenever it is awarded that costs shall be paid, in such case it is always understood, such costs as shall be taxed by

the master or the prothonotary. Str. 737.

In Sir Thomas Hales v. Taylor, Stra. 695. The court said it was discretionary whether they should inforce an award by attachment, and there being a contrariety of evidence, they would not determine it by affidavits, since the plaintiff was not without remedy by an action on the award.

An award was, that the one party shall pay the other ten pounds and the costs of a suit now depending in an inferior court, and then to give mutual releases.—Per cur. To pay such costs as the master shall tax, is good; for id certum est, quod

Of referring Causes to Arbitration; and herein of Disobedience to the Award.

certum reddi potest. But this is uncertain, and carries it farther than has hitherto been allowed.

The court refused an attachment for non-payment of money due on an award, because the defendant was a bankrupt, and incapable of paying it. Anon. B. R.

A. was awarded to pay a fum of money to B. at a future day; and before the day, the money was attached in his hands, by the custom of London, for a debt of B.'s, though the award had been made a rule of court; and this was held erroneous, and A. was obliged to pay the money to B. Anon. B. R.

The defendant, a feme sole, and the plaintiff, agreed to a reference. The defendant was awarded to deliver up two notes and pay a fum of money; she married, and the husband refused to pay: and it was quæried, in this case, if the court could grant an attachment against both or either

of them. Anon.

The 9 & 10 W. 3. c. 15. f. 2. which limits the time of complaining against awards to the last day of the next term after the award made, extends not to fuch as are made in pursuance of a rule of niss prius, but only where the Submission is by obligation. And nothing is a ground within that statute for the court to fet aside an award, but manifest corruption in the arbitrators. We will not unravel the matter, and examine into the justice and reasonableness of what is awarded. Per cur. in Anderson v. Coxeter. Stra.

Motion to make a rule to shew cause absolute for an attachment against defendant for non-performance of an award. The defendant offered to object to the award in point of law. The fubmission being made a rule of court, the court said no objection to the award can be made after the first term, Per Stat. 9 & 10 W. 3. it comes now too

Barnes, 55. late.

Rule of nisi prius to refer an award made, and motion for an attachment for non-performance. Against the attachment it was infifted that the arbitrators had not purfued their authority, because the submission confined the award to be made in writing indented; and the award produced was not indented. Per cur. This is an immaterial objection, and just the same as if the submission had said,

Of referring Causes to Arbitration; and herein of Disobedience to the Award,

that the award should be made on gilt paper. Let an at-

tachment go. Barnes 55.

Motion for an attachment for non-payment of money, awarded under a reference by rule of court. Defendant shewed for cause, that the arbitrator being, by the rule, confined to state the plaintiff's demand only, was debarred from the consideration of the defendant's demand on the plaintiff. That desendant having brought his action against plaintiff, plaintiff had pleaded the general issue, and given notice to set off his demand under the award. Per cur. It appears that demand of the money awarded was made, and desendant in contempt June 10. The notice to set off was not till June 24. If desendant pays the money, it cannot be set off. Plaintiff refusing to consent to a reference to the prothonotary, the rule was made absolute for an attachment, but ordered to stay a month in the officer's hands. Harrisen v. Oliver. Barnes 56.

At the affizes plaintiff had a verdict: matters in difference were referred to arbitrators by rule, who made an award within the time limited, whereby defendant was ordered to pay plaintiff 300 l. The rule of affizes was made a rule of court. And plaintiff electing to proceed upon the verdict, and not by attachment of contempt, for non-performance of the award, moved for leave to enter judgment, and take out execution for the money awarded; a rule was made to shew cause, and afterwards absolute on affidavit of

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Note, The court thought this a proper application, and that plaintiff had not a right to enter judgment without leave of the court.

A matter was referred by consent, to the three foremen of the jury; and, before the award was made, one of the parties served the arbitrators with a subpæna out of Chancery, which hindered the proceeding to make the award: and the court held this a breach of the rule, and granted an at-

tachment nifi. Davila v. Almanza. Salk, 73.

Verdict for plaintiff for security. Reference by rule to three of the jurors. Award in plaintiff's favour. Rule obtained to shew cause why the postea should not be delivered to plaintiff, to take out execution for the money awarded. Objection by defendant, that no affidavit was produced of the due execution of the award, or of a demand of the money; which the court held to be as necessary as if the Vol. I.

Of referring Causes to Arbitration; and herein of Disobedience to the Award.

motion had been for an attachment; and the rule was dif-

charged. Read v. Garnett. Barnes 58.

Upon affidavit that the original award was loft, by coming up in the Briftol mail, which was robbed, an attachment was moved for upon a copy of it, and granted nift. Ro-

binfon v. Davis. Stra. 526.

Upon a submission to the award of the three foremen of the jury, who made their award, the defendant moved to fet it aside, because they went on without giving him time to be heard, or produce a witness. And Holt chief justice denied the diversity. He said the arbitrators being judges of the party's own choosing, the party should not come and fay they have not done him justice, and put the court to examine it. Aliter, where they exceed their authority. However, the award was examined and confirmed, and the plaintiff moved for an attachment for not performing it; and the court held, that the non-performance, while the matter was fub judice, was no contempt. Then the plaintiff moved for his costs, and that was denied; upon which, Powell justice said, that seeing they could not give the party any costs, he should never be for examining into awards again. Norris v. Reynolds. Salk. 73. Ld. Raym. 857.

Per Holt Ch. Just. In Reynolds v. Grey. Ld. Raym. 222. If arbitrators have authority to chuse an umpire, and they chuse A. accordingly, they have executed their authority, and cannot make another election, though A. does not accept of the umpirage. Contra. If they elect upon express condition; for then he is no umpire until the condition be performed. But Rokeby justice doubted of this; for it seems implied in the election, if the party elected will accept it. In the same case it was also said by Holt chief justice, that if the arbitrators chuse an umpire before the time for them to make the award be expired, it is void, though they

are refolved to make no award themselves.

Where an award is made a rule of court, it shall not be fet aside, unless there was practice with the arbitrators, or some irregularity; as want of notice of the meeting. Also you shall not take exceptions to the formality of it, but

Thall perform it. Per Helt Ch. Just. Salk. 71.

On shewing cause against an attachment, for non-performance of an award, and objected. 1. That though the award be proved executed, it does not appear when. 2. That the costs ordered to be paid were taxed by prothonotary

Of referring Causes to Arbitration; and herein of Disobedience to the Award.

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thonotary T. who is not named in the award. And 3. That no release was awarded. To these it was answered, that as there is no assidavit to induce suspicion, the execution of the award is sufficiently proved; that reasonable costs are awarded to be paid; and though the prothonotary be not named, he is the proper officer to tax them; and that all actions by the award are directed to cease, which is a sufficient release. The court thought the objections sufficiently answered, and would have made the rule absolute, but plaintist consented to pay within two months. And per cur. Where the objections arise upon the sace of the award, they may be made at any time; but where the party complains of corruption, or ill practice, he must do it within the second term. Stephenson v. Browning. Barnes 56.

If there is a parol submission to an award, the remedy for non-performance thereof is by action on the cofe. But formerly there was a difference in the old books, between where money was awarded, and where a collateral matter on a parol submission, because the law was taken then, a collateral matter was awarded, the plaintiff had no remedy, upon a parol fubmission, to compel performances, as he had where money was awarded, for he might have debt. Yet now (Per Holt Ch. Just.) the law is otherwise; for, as the law is now, the party might have an action on the case for the breach of his promise, in non-performance of the award; for the submission is an actual promise to perform the award of the arbitrator; and in such action, the fubmission is now held sufficient evidence to maintain the action; and if fo, then it is within the same reason, as where a submission is by bond, and a collateral matter is awarded; or, where upon a parol and submission money is awarded; in which cases, the awarded is a good plea, without performance, in regard the party has remedy to compel it. Ld. Raym, 1040.

Of Merdids.

OF Verdicts there are various forts, viz.

1. A general verdict, that is, when the whole matter in iffue is found generally: and in this verdict the jury may take upon themselves the knowledge of the law; but herein they run the danger of an attaint.

2. A verdiet de bene effe, that is, where the matter in issue is found conditionally subject to the opinion of the court.

3. A privy verdict, that is, where the verdict is given privily, or in fecret, to the judge, till a verdict is given openly by the jury in court.—This fort of verdict is only permitted for the ease of the jury, that they may refresh themselves; and they may differ from this privy verdict when they come into court.

4. And a special verdist, that is, where the matters in fact submitted to the jury are found specially; and they submit the questions of law, arising upon these matters of fact, so specially found, to the consideration of the court.

The jury, on giving their verdict for the plaintiff, affels the damages he has sustained, in consequence of the injury whereon the action is brought; and which is taken down by the judge's affociate, on the back of the nist prius record, and called, "the postea" afterwards, it being the first word with which this entry begins.

Where there are several issues, and the jury find a verdical for the plaintiff generally, it is always necessary to pursue the issues in drawing the poster; because, the jury, by finding generally, confirm the truth of all the issues submitted to them.

When the cause is tried at the sittings in London and Middlesex, the associate of the chief justice delivers the record immediately to the party for whom the verdict has been given; and he indorses the poster from the associate's minutes. But when the cause is tried at the assizes, the associate keeps the

The court-fees paid by the party who obtains a verdict (except about 10 s. 6 d. paid by him against whom the verdict is given) are usually as follows:

In a town cause verdict for plaintiff, 2 18 8
When the cause is referred, - - - 2 7 10
On a nonsuit, - - - - 2 1

Country causes differ a little from the above.

And herein of the Postea, and entering of Verdicts, &c.

record till the next term, and indorfes the poftea in the in-

terim, for which he receives his fee at the trial.

Every clerk of affize, and the affociate to the lord chief justice, shall make returns of posters upon record issuing out of this court, whereupon any proceedings have been by virtue of any writ of nisi prius distringus, or habeas corpora suratorum, and cause the same to be delivered to the respective prothonotaries, upon the quarto die post of the return of the writ of nisi prius in bank, under the penalty of twenty pounds; and, that all excuses may be taken away, the respective clerks of assize, and associate, at the trial, shall take the sees due to them respectively for the return of every such poster. Easter, 2 Jac. 2. in C. B.

Every attorney who receives any postea from the associate, ought to get it marked, by the clerk of the posteas, within two days after he receives it. Tr. 2 Jac. 1. But now it is thought sufficient, if the postea is marked at any time before the costs are taxed. The marking the postea is putting the word "deliberatur" thereon, or, "delivery of record," for which he is paid 4 d.—then you give a rule for judgment on the postea with the clerk of the rules, for which he is paid 15. 10 d. Andrews 296.—But no rule is given in

C. B.

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No judgment can be figned upon a writ of nist prius, or enquiry executed, either for plaintiff or desendant, until the expiration of four days, exclusive of the entry of a rule for judgment; during which four days the party, against whom the verdict passed, may move the court for arrest of judgment, or for a new trial.—But in C.B. though no rule is given, you must wait the same time as in B. R.

And herein of the Postea, and entering Verdicts. &c.

After the rule for judgment is out, you must get the nist prius record stamped with a double half-crown stamp, and then apply to the secondary to tax the costs, which being done, the judgment is to be entered of record, and such execution as may be necessary properly sued out.

In case of a special verdie, the plaintiff's attorney must enter the same in due form on record, and deliver it to the clerk of the papers, and get a counsel to move for a concilium, then draw up the rule for the same, and serve it on the defendant's attorney.

On argument of special verdicts, the judges must have paper-books delivered them, by the attornies, as in cases of argument upon demurrers—which vide ante, title Demurrer.

On the trial of an action of covenant, the jury gave a verdict for 274 l. 11 s. and the judge entered it so in his minutes; but the clerk at nist prius had only marked it 1 s. on back of the distringus: and, on motion to the court to alter the indorsement, by making it agreeable to the judge's note, the court ordered it to be amended accordingly. Newcombe v. Green. Stra. 1197.

And herein of the Postea, and entering Verdicts, &c.

When the record is returned, with the postea ingrossed, you get the postea stamped with a double half-crown stamp, and apply to the prothonotary to tax the costs; which being done, deliver the record and postea to the clerk of the judgments, who continues the same on the roll, and awards judgment.

In case of a special verdict, the plaintist's attorney must enter the proceedings on record to the end of the special verdict, and deliver it to the secondary in court, and get a serjeant to move for a concilium; then draw up the rule for

the same, and serve it on the defendant's attorney.

The fame in this court. Vide ante, title Demurrer.

After verdict obtained by the plaintiff, the records of niss prius, and writs of habeas corpora juratorum were accidentally lost by the affociate. On motion, a rule was made for the defendant and affociate to shew cause, why new records and writs should not be made out agreeable to the old, and verdicts returned according to the sinding of the jury: and no cause being shewn, the rule was made absolute on an affidavit of service. Barnes 466.

A rule to shew cause, why the postea should not be amended, by returning the verdict on the third, instead of the first count, according to the finding of the jury, was made absolute, upon the report of the judge who tried the cause. And it was ordered, that the associate do amend the postea in court; that desendant have four days after to move in arrest of judgment; and that plaintiff do pay the desendant's

costs of the application. Barnes 449.

Action for several sets of words. On the trial plaintiff had a verdict, and the damages were found entire, though some of the words were not actionable: on which it was moved for a venire facias de novo, that plaintiff might sever his damages, according to an ancient rule of court, and granted. Barnes 478.

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Df Judgments.

Of Judgments by Default, &c. and herein of the Writ of enquiry.

The defendant does not plead in the time allowed by the rules of the court, the plaintiff may fign judgment against him [of which see hereaster]. If the action sounds only in damages, this judgment, when no defence is made, is called an Interlocutory Judgment, because the quantum of the damages which the plaintiff has sustained is still to be ascertained by a jury before final judgment is signed: but if the action is in debt, the letting judgment go by default is an admission of the very demand the plaintiff has made in his declaration, and therefore the judgment is final.

If judgment is figned, whether it is regular or irregular, motion to fet it aside must be made two days before the day appointed for executing the writ of enquiry. But if the irregularity be in the notice subscribed to a copy of the process served on defendant according to the statute, then the motion must be made before judgment is signed. But if the irregularity is in the notice of the declaration, then two days

before judgment figned.

After plea pleaded the defendant may confess the action

and withdraw his plea.

But where in ejectment the defendant pleaded not guilty, and then relicia verificatione confessed the action, and the defendant's attorney subscribed the declaration accordingly; and then it was moved, that the court would permit the plaintiff to enter judgment for himself, it was denied—for, Per Cur. The defendant's attorney ought to come in proper person before the master of the office, and do it there. And though it was urged that the attorney could not come by any possibility, yet the motion was denied. Ld. Raym. 345.

When there are issues in fact, and in law, the plaintiff may wave the issues in fact, and take out an enquiry upon the judgment obtained on demurrer. Fleming v. Langton.

Stra. 532.

But if the plaintiff will carry down the issues in fact to trial before the demurrer is determined, he ought to take out a venire tam to try the issue quam, to enquire of the damages upon the demurrer, and in that case the jury gives contingent damages. Ibid.

But

Of Judgment by Default, &c. and herein of the Writ of Enquiry.

But in the former case where the plaintiff waves the issues in fact, and executes his writ of enquiry upon the demurrer—and then comes to enter his final judgment, he must enter a nolle-pros upon the roll as to the issues in fact, otherwise advantage may be taken thereof upon a writ of error.

The notice of enquiry is in the following form:

In the King's Bench.

 $\begin{cases} A. B. \\ \text{against} \\ G. D. \end{cases}$

SIR,

TAKE notice that a writ of enquiry of damages will be executed in this cause on next the day of this instant December, between the hours of ten and twelve of the clock in the forenoon, at the

Your humble servant,

I. M. attorney for plaintiff.

To Mr. O. P. attorney for defendant.

The writ of enquiry must be returnable as the original proceedings are, whether on a general return day or a day certain. But should it be otherwise by mistake, it is not an irregularity, but error, therefore no advantage can be taken thereof by motion to set aside the inquisition. Vide Barnes 230. But though it is error, yet it may be helped now by the statutes of Jeosails, and be amended from the award thereof upon the roll.

A writ of enquiry may be altered, provided it is resealed

before it is executed. Barnes 232.

Improper or defective notices of executing writs of enquiry, are cured by appearance of the party or his attorney.

Barnes 233.

The writ of enquiry must be engrossed on a double twelvepenny stamped piece of parchment, and sealed, but not signed, with the attorney's name indorsed, and the time and place when and where notice has been given for the execution of it, and then it must be taken to the sheriss office, where it should be lest two days before the execution, that

Of Judgment by Default, &c. and herein of the Writ of Enquiry.

the sheriff may have time to summon a jury.—But in London, as a jury is generally sitting at Guild-hall—and in Westminster at the Guild-hall Westminster in term, or, if in vacation, at the Three Tons in Brook-street, Holborn, between the hours of ten and twelve, this is not much regarded, and

notice thereof must be given accordingly.

When the day of executing the writ comes, the sherist's deputy and jury are attended by the plaintiff's attorney, with evidence to prove the plaintiff's demand, or the damages sustained by him; and the defendant, in mitigation of such damages, may produce witnesses on his part: on the return of the writ the plaintiff's attorney must call upon the sherist for the inquisition which is annexed to the writ, and for which a receipt must be given.

In London for executing a writ of enquiry you pay 1 1. 7 s. 4 d. and for every witness sworn 4 d. in Middlesex, and

most other counties, 11. 10 s. 6 d.

If the writ of enquiry is executed in the county, there must be eight days notice exclusive. Att. Prac. 192.

If in Louden or Middlefen, and the defendant lives within forty fittles of London, eight days notice exclusive must be given.

If above forty miles, fourteen days exclusive. Att. Prac.

If plaintiff concludes ad patriam, and gives notice of trial on the back of his pleadings, if the defendant does not join iffue before the rule is out, then after judgment is obtained, the defendant's attorney shall be obliged to accept notice of executing a writ of enquiry, from the time of giving the faid notice of trial. Hil: 8. Ges. i. But then the plaintiff must give notice of the hour, and place of executing it. Note inde.

If plaintiff in replevin is non-fuited, the defendant may have a writ of enquiry, and must give fifteen days notice. thereof. Per flat. 17 Car. 2.

No notice is given of executing a writ of elegit, as there must be of executing a writ of enquiry. Trin. 30. Car. 2. Rich. Att. Prac. K. B. 346.

Nor of an extent. Ld. Raym. 1382.

There must be the same notice of executing a scire fieri enquiry, as of a common writ of enquiry. 1 Stra. 235, 623. Ld. Raym. 1382.

Interlocutory judgment was figned in Trinity term, 1737; and in Aug. 1738, a writ of enquiry was executed upon eight days notice, which was fet aside as irregular, and held, that where a term's notice of trial is required, there must at the same distance of time, be the like notice of executing a writ of enquiry. Payton v. Burdus. Strange 1100.

A writ of enquiry cannot be executed on a Sunday, as it is within the act 29 Car. 2. c. 7. and the court is bound to look into the almanack. Stra. 387.

Notice was to execute a writ of enquiry by 10 o'clock; and no defence being made, the court fet it aside for incertainty. Stra. 1142. The

THE same in this court. Mich. 1654.

The fame. Mich. 1654.

The fame, though the defendant is an attorney. Barnes

The fame rule in this court. Hil. 6 Geo. 1. Att. Pract.

Where the defendant demurs to the plaintiff's declaration, the defendant's attorney shall accept notice of enquiry on the back of the joinder in demurrer.—And so where the defendant pleads a dilatory plea, and the plaintiff demurs, the defendant's attorney shall accept of notice of enquiry on the back of the demurrer. Tr. 10 Geo. 1. Att. Pract. 207.—the like in B. R.

So it may be given on the back of the issue of nul tiel record. I Barnes 176. Pract. Reg. 443. Att. Pract. 208.

The fame in C. B.

The same. 2 Barnes 237. Pract. Reg. C. P. 379. Rep. & Cas. of Pract. C. P. 1.

If there have been no proceedings for a year, after interlocutory judgment, there must be a term's notice, which must be given before the essoign day of the term. East. 13 Geo. 2. s. 21. and Mich. 1654.

If the plaintiff appears for the defendant, and figns judgment for want of a plea, he may give notice of executing a writ of enquiry to defendant himself, or leave the same at his last place of abode. Mich. 1 Geo. 2.

But notice to the defendant himself, where his attorney is known, is bad. Pract. Reg. 275. Cas. of Pract. C. B.

62.

Notice of executing the writ of enquiry should be confined to two Hours. Prast. Reg. 445. Caf. of Prast. C. B. 213. 4 Barnes 213, 221.

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The fame in this court.

If the writ of enquiry is not executed according to notice, the defendant shall have costs. Note on Reg. Hil.

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An enquiry executed on the day of the return, is good. Ld. Raym. 1449.

Notice of executing it at 10 in the forenoon, or as foon after as the sheriffs can attend, bad. Pract. Reg. 134. Caf.

of Pract. C. B. 99. 1 Barnes 210.

Notice must be certain as to the place; and where it was faid at the Three Tons, in Brook Street, Middlesex, it was held bad, there being three Brook Streets in Middlesex. I Barnes 218. Pract. Reg. 447.

If at Westminster generally, bad. Pratt. Reg. 447.

Notice may be given to the country attorney in the coun-

try. 2 Barnes 239.

If it is to be executed at the affizes, the notice must be generally for the affizes, and it need not be entered with the marshal. Att. Pract. 223.

Irregularity in the notice, &c. is cured by making defence

at the execution of it. 2 Barnes 245.

The same in this court Tr. 13 Geo. 2. Att. Prast. 228.

It may be executed on the return day, before the rifing of the court. Caf. of Pract. C. B. 84.

The notice mistook the plaintist's name, and held bad.

2 Barnes 247.

Continuance of notice of enquiry should be served true days before. I Barnes 213.

So short notice. Pract. Reg. 444.

Notice of enquiry in a joint action ought to be given to both defendants. Pract. Reg. 443.

A countermand of notice of executing a writ of enquiry is to be given in the fame manner as countermand of notice of trial, i. e. in a country cause, notice of countermand must be delivered fix days before the day of executing the fame: and the like notice, if the enquiry is to be executed in town, and the defendant lives above forty miles from London.

But if to be executed in London or Westminster, and the defendant lives within forty miles, then two days before.

If the action is on a promissory note, or bill of exchange, the fum due thereon is admitted; and, therefore, they need not be proved on executing a writ of enquiry. 3 Wilf. 155. Stra. 1149. but formerly held otherwise: but they must be produced, in order that it may be feen, whether any money is indorfed to be paid upon them. Barnes 233.

If a writ of enquiry is executed at the affines before a judge of nist prius, he is only an affishant to the sheriff, and has no judicial power: and, if the parties come to any agreement there, the way to make it effectual is to bring it to him to sign, and afterwards to move the court to have it made a rule of court. Per Holt, ch. just. Hil. 13 W. 3. B. R. 12 Mod. 610.

The defendant, on motion, may have the writ of enquiry executed before a judge, at the affizes, if he thinks proper, as the extraordinary costs fall on himself. Barnes 233.

If witnesses will not voluntarily attend at the execution of the writ of enquiry, the party, wanting their testimony, may have a fubpæna ad testissicandum; which is to the following effect:

" GEORGE the Third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. To E. F. G. H. &c. greeting : We command you, that all and fingular bufineffes and excuses being laid aside, you, and every of you, be in your proper persons before our sheriff of Midthe defex, on day of noon, of the same day, at the o'clock, in the Guildhall, in King Street, Westminster, [if in vacation, or in an afternoon in term-time] at the Three Tons, in Brook Street, near Holbern, in the county of Middlefex, to testify the truth in a certain matter of controverly, pending in our court, before us, at Westminster, between A. B. plaintiff, and C. D. defendant, of a plea of [as the action is] in which faid matter a writ of enquiry of damages will then and there be executed; and this you, or any of you, are by no means to omit, under the penalty upon each of you of one hundred pounds." Witness, &c.

You fign and feal this writ, and make out a note for the office, and tickets for the witnesses.

A subpana ticket on a writ of enquiry.

Mr. ____

By virtue of a writ of subpana to you directed, and herewith shewn unto you, you are personally to be and appear before our sheriff of the county of or his under theriff, on instant, at 10 o'clock in the forenoon of the same day, at the house of in the faid county, then and there to testify the truth, according to your knowledge, upon a writ of enquiry of damages, to be then and there executed, in a certain cause now depending, between plaintiff, and defendant, in a plea of on the part of the plaintiff; and this you are not to omit, upon pain of one hundred pounds. Dated the day of twentieth year of the reign of our fovereign lord George the Third, by the grace of God, king of Great Britain, France, and Ireland, defender of the faith, &c. and in the year of our Lord one thousand feven hundred and feventy nine.

By the Court.

Under sheriffs ought to execute writs of enquiry, and not appoint deputies; but if executed by a deputy, and defence made thereon, the court will not, for that, set the inquisition aside, though the under sheriff is liable to an attachment. Vide Barnes 232. But the sheriff may appoint a person, under his seal, to execute an enquiry.

After writ of enquiry executed, there must be four days, exclusive, before plaintiff can sign judgment. Ruled 1 Salk.

The jury, upon a writ of enquiry, must find fome damages, otherwise it is bad.

If they find small damages the inquisition must stand. Barnes 230.

If they find excessive damages, the defendant may move the court to set aside the inquisition.

A fecond writ of inquiry cannot issue till the first is returned, if it does it is irregular, and the court will set aside the execution thereof on motion. Barnes 231.

Vol. I. U Motion

Motion to fet aside an interlocutory judgment must be two days before enquiry executed. 1 Barnes 187. 2 Barnes 211.

Pract, Reg. 355.

After interlocutory judgment, and writ of enquiry awarded, the plaintiff became a bankrupt; and afterwards the enquiry was executed in his own fame, and held good, without a fcire facias sued out by the affignees. 2 Will.

358. Bibbins & al' v. Mantel.

Execution of a writ of enquiry may be adjourned after it is entered upon. Case was upon an enquiry executed before the chief justice; the plaintiff could not prove the quantity of goods delivered, for want of a servant who was absent; and on plaintiff's submitting to pay costs, he adjourned it over to the next sitting, and compared it to the case of a coroner's inquest, or a commission of lunacy, where the jury are adjourned over several times, it being but an inquest of office. Coleman v. Mawbey & al'. Stra.

In covenant there was judgment by default, and a writ of enquiry was executed, on which such small damages were given, that the plaintiff, distaissied therewith, moved for leave to discontinue his action; and this being objected to on the part of the defendant, the court said, they had no power to give such leave without the consent of the defendant. Et per Holt, ch. just. It is certain, that the action may be discontinued by the assent of the defendant; and that, even after a verdict, it may be discontinued by such assent; and that there was no difference (in respect to the discontinuance) between a verdict upon issue joined, and a verdict upon a writ of inquiry: and it was held, that the plaintiff could not, by law, discontinue without the assent of the defendant. Stephens v. Etherick. Carth. 86.

When to be figned, &c.

THE plaintiff in B. R. must give a rule for judgment with the clerk of the rules in like manner as rules to plead, &c. which rule is out in * four days, exclusive [Sunday, or any other day on which the court forth not sit, not being accounted one, unless entered on the last day of the term, or within four days after.]

So that, if a rule is given on Wednesday, the plaintiff cannot sign judgment till the Tuesday after. Vide Salk. 399. Note on Reg. East. 5 Geo. 2.

In C. B. no rule for judgment is given, but plaintiff must wait or stay the same time before judgment can be signed.

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On judgment by default, no rule need be given, because, the desendant, in that case, tacitly confesses the justice of the plaintist's demand, by not coming in time to desend the action.

Nor need the defendant give a rule, where the plaintiff is nonfuited.

If the plaintiff has obtained an interlocutory judgment, he must not give the rule for judgment till the day after the return of the writ of enquiry.—And, if the writ of enquiry be returnable the last day of the term (as it may) he must not give the rule till the day after; and then after four days may sign judgment.

If the plaintiff appears for the defendant, he need not call on the defendant's attorney for a plea before he figns judgment. I Barnes 177.

The plaintiff cannot fign judgment, for want of a plea, till the afternoon of the day after the rule to plead is out—or order for time to plead is out. The fame in C. B. Barnes 266.

If a plea be put in before judgment figned, though the time for pleading is out, yet the plaintiff cannot fign judgment. Suppl. to 2 Barnes 39.

If the demand of a plea is not made till the rule to plead is out, judgment must not be figned till twenty-four hours after demand made.

A rule for judgment may be given within four days after the term, and entered as of the last day of the term. Note on Reg. East. 5 Geo. 2. B. R.

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^{*} The four days are given, that the defendant may move in arrest of judgment, or for a new trial.

When to be figned, and how to be entered, &c.

It is the allowed practice to enter judgments in a vacation, as of the precedent term, and they will be good judgments of the precedent term. Ld. Raym. 850. Though they wont affect purchasers by the statute of frauds, but from the signing. So that if A. recovers judgment against B. and B. dies in the vacation within the year; at the end of it A. may sue out a fi. fa. as of the precedent term, and levy the goods of B. in the hands of his executors. Ibid.

A. became a bankrupt between interlocutory and final judgment; yet final judgment should be entered in the name of A.

Both B. R. and C. B. will fet aside a judgment that is regular on putting plaintiss in as good a condition. Stra. 823. But it is always on payment of costs. Sisted v. Lee. Salk. 402.

If a cause rests four terms, without any proceedings, judgment cannot be signed without a term's notice. Mod.

Caf. 18.

If final judgment is not figned, a motion to fet afide an inquisition for excessive damages may be made after the four days of the term, in which the writ of enquiry is returnable. 2 Will. 379.

There cannot be final judgment in real or mixt actions,

without a peremptory rule on motion. Salk. 399.

If plaintiff do not enter judgment, after a verdict for him, because the damages are small, the defendant may. Salk. 401.

If judgment be figned or pronounced in any term, it may be entered upon a roll of the same term, at any time before the essoign day of the next term. Mod. Cas. 191.

The court will not give leave to enter up a judgment of twenty years standing, nunc pro tune, for at such a distance of time it must be presumed, that the debt was satisfied. Flower v. Ld. Bolingbroke. Stra. 639.

A judgment cannot be amended after the term in which

it was entered.

If defendant, having a judge's order for time to plead, plead a plea in abatement, plaintiff may fign judgment, and no occasion to apply to the court to set aside the plea. Barnes 263.

So if he puts in a frivolous demurrer. Barnes 271.

Verdict for defendant on two issues joined, viz. upon not guilty and a justification. By the special plea the trespass was confessed; judgment was ordered to be entered for the plaintist, notwithstanding the verdict, the trespass being confessed by the special plea. The true method is not to

When to be figned, and how to be entered, &c.

flay the entry of the judgment upon the verdict by rule, but to enter the verdict upon record, and then judgment for

the plaintiff non obstante veredicto. Barnes 266.

Defendants pleaded three pleas by leave of the court, on two, issues were joined; and on the third, for want of a rejoinder, the plaintiff signed judgment quod recuperet, and took out execution. Per cur. The issues on the two other pleas must be tried before plaintiff can recover: If the defendant prevail on any, the plaintiff cannot recover. And the rule was made absolute for setting aside the judgment and execution. Barnes 269.

When the cause of action is fully confessed by the plea, and the matter of the plea is ill in substance, judgment shall be given for the plaintist, notwithstanding a verdict

for the defendant. Ld. Raym. 924.

If an agent gives time, a country attorney cannot fign

judgment till that time is out. Barnes 256.

In an inferior court, the plaintiff demurred to defendant's plea; and the entry of the judgment for the plaintiff on the demurrer was, "Ideo consideratum est, &c." And not said as usual, "Et quia videtur curiæ hic quod placitum prædi&t. præsat. desendentis minus sufficiens in lege, &c." And now this judgment was reversed for that cause; for when a demurrer is joined, the court ought first to determine the matter of law, whether sufficiens or minus sufficiens, before they pronounce judgment, and by this judgment it does not appear that they determined the matter of law before them. Salk. 402.

Defendant's attorney sent a note to plaintiff's attorney on stamped paper, thus, "I plead nil debet, yours, &c." And without calling for a plea in form, the plaintiff's attorney signed judgment, which was held regular, and the notice to be no plea. Pleas delivered to attornies must be drawn up in the same manner as to be left in the office.

Barnes 230.

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If a summons for time to plead has been had, though plaintiff's attorney attends and stays an hour, and defendant's attorney does not attend, yet the summons must be discharged before judgment can be signed. Barnes 240.

But where in *ejellment* the tenant entered an appearance, and sent a note, that he pleaded not guilty; and, for want of a plea in form, plaintiff's agent signed judgment, such judgment was set aside; because, according to the words of the rule against casual ejector, unless the tenant appears, a new declaration against the tenant should in strictness have been delivered, before a plea in form could be required. barnes 270.

How to be entered, and with whom.

If the defendant does not plead, &c. in proper time, or judgment is given against him upon demurrer, in actions sounding only in damages, there goes a writ of enquiry to the sherist, for a jury to assess the damages, as we have seen; and then, upon the return thereof, and rule given for judgment, and the time therein expired, the plaintiff is at liberty to sign final judgment.

But by letting judgment go by default in debt, or if, upon demurrer in that action, judgment is given against the defendant, such judgment is final, and signed on a double

half-crown stamp.

If plaintiff sues in B. R. by original, vide the opposite practice in C. B.

If there has been a writ of enquiry executed, and returned, you get the inquisition stamped; or if there has been a verdict for plaintiff, the attorney gets the poster stamped with a double half-crown stamp, [the rule for judgment being expired] and then takes it to the master or secondary of the King's Bench, who will tax and allow the plaintiff his costs de incremento thereon; and then final judgment is said to be signed, and execution may be taken out.

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How to be entered, and with whom.

THE same in this court; but no rule for judgment is given, as in B. R. though the plaintiff must wait the same time, viz. four days exclusive.

The fame.

If the plaintiff has judgment, and it be not upon a verdiet, his attorney must make out a pracipe for a special original returnable on the first return of that term, in which judgment, of the interlocutory judgment, in case of actions sounding in damages, and writ of enquiry thereon is entered, to warrant the *judgment, which pracipe must be carried to the cursitor of the county in which the action is laid, on or before the essoin day of the subsequent term, otherwise by an order in Chancery he cannot make out an original writ of a return past after that time, without special warrant from the chancellor, lord keeper, or master of the rolls. See lord Clarendon's orders in Chancery.—Upon making out this original writ, the cursitor takes the fine. Of which see under title Outlawry.

The original writ, in this case, being made out, the plaintiff's attorney returns it of course, and then files it with the custos brevium. And he must also file a warrant of attorney for plaintiff, and one for the desendant, if he ap-

peared by attorney.

If there has been a writ of enquiry executed and returned, you get the inquisition stamped; or if there has been a verdict for plaintiff, the attorney gets the poster stamped with a double half-crown stamped, [having waited the four days allowed for the defendant to move in arrest of judgment, &c.] and then takes it to the prothonotary with whom the proceedings have been entered, who will tax and allow the plaintiff his costs de incremento thereon, which is called signing the final judgment; and execution may then be taken out.

^{*} i. e. In case a writ of error should be brought.

How to be entered, and with whom, &c.

By Reg. M. 5 Anne. Judgments must be entered fairly on the roll, or an incipitur thereof, before figned; and the names of the plaintiff and defendant, the county, and the nature of the action, with the attorney's name, to be entered in a book to be kept by the secondary, for which nothing shall be paid but the accustomed see for entering such judgment.

All iffues and judgments ought to be entered on the rolls in a full fair hand, with a large margin of an inch at least, and a convenient space left at the top [about ten inches] for binding up the same; and like space at the bottom, that the writing be not rubbed out. Hil. 1657.

Clerks and attornies who enter causes on record, are to enter, in the beginning, warrants of attorney for plaintist and defendant. Reg. East. 4 Jac. 2.

But this entry upon the roll is not the warrant of attorney, but only a memorandum of it; which entry was introduced in James the fecond's time, when Wright was chief justice.—Heretofore they were upon a roll by themselves, and so they ought to be now. Per Holt. ch. just. Cremer v. Wicket. Ld. Raym. 509. Carth. 517. Salk. 88. 2 Ld. Raym. 805.

The form of the entry is in this manner:

As yet of Michaelmas term [as the term is]

Witness William Earl Mansfield.

Middlesex. A. B. putteth in his place William Lyon his attorney, against C. D. in a plea of trespass upon the case [or whatever the action is]. If the defendant is an executor or administrator, or has an alias distus, &c. he must be properly named.

Middlesex. C. D. putteth in his place Michael Hodgson his attorney, against A. B. in the plea aforesaid.

Then begin with a * memorandum if the fuit is by bill, which varies in particular cases, of which see ante under the

^{*} But when by original there is no memorandum.

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How to be entered, and with whom, &c.

When final judgment is figned upon inquisitions and possess, the record must be delivered to the clerk of the judgments of the prothonotary with whom the proceedings have been entered, who continues the same on the roll.

If the plaintiff has judgment, and it be not upon a verdie, you enter your judgment, leaving an inch margin, and beginning about ten inches from the top of the roll with the declaration in the following manner:

Middlesex. C. D. late of yeoman, was attached [or summoned as the case is] to answer A. B. in a plea of [as it is] and whereupon the said A. B. by I. M. his attorney, complains, &c. [and so recite the whole declaration] and thereof he brings suit, &c.

Then beginning a new line-

And the said C. D. by O. P. his attorney, &c. as the case is, whether by nil dicit, non sum informatus, cognovit actionem, &c.

Then, if the judgment is final, enter the same—or, if there has been a writ of enquiry, enter the interlocutory judgment with the award of the writ of enquiry, and inquisition thereon, and if there is occasion for continuances, the same must be properly entered; for all of which matters, see the various books of entries, which forms I omit to insert here, as they would swell this book to an extraordinary bulk.

Vide next page as to continuances on the roll in B. R. by vicecomes non missit breve, which will equally serve to illus-

trate the practice in this court in fimilar cases.

Great inconveniences having happened by attornies neglecting to file their warrants of attorney, by which judgments have been reverfed, and plaintiffs loft their debts; it was ordered therefore, that no judgments whatfoever [except final judgment upon postea, writs of enquiry, and nonpros] shall be signed by any of the prothonotaries, unless the stamp of the clerk of the warrants be impressed on the paper whereon such judgment is to be signed, whereby it may appear the warrants of attorney are duly filed. Mich. 5 Geo. 2. Of sling warrants of attorney, vide ante, under the title "Of making up the Issue."

When

How to be entered, and with whom, &c.

title, " Of making up the iffue in B. R." then go on to the end of the declaration.

Then beginning in a new line.

And the said C. D. and so on as the case happens to be, whether judgment by nil dicit, non sum informatus, cognovit actionem, &c. or if it is a judgment upon a verdict to the end of the issue; and then, if the cause was tried within the term next after the term in which the issue was joined, you go on after the award of the venire and day given, in this manner: "Afterwards the process thereof is continued be"tween the parties aforesaid, of the plea aforesaid, by the jury aforesaid being respited" between them, before our lord the king at Westminster, until next after [the return of the distringus] unless the king's right trusty and well beloved William Earl Manssield, &c. [or the judges who went the circuit] and so on with the poster and entry of the judgment.

But if the cause be not tried within the term next after the term in which issue was joined, the venire must be continued on the roll by "vicecomes non misset breve," and award

of a new venire.

And in case there should be several terms between the term in which the issue is joined, and when it is tried, the award of a new venire must be entered on the roll from term to term, with a "vicecomes non misst breve" to each, to the term when the distringus is sued out, which should be tested on the return day of the supposed last venire.

The iffues may be entered on both fides the roll, but the writing should not come too near the bottom on the first side, where must be written the number-roll and chief clerk's

name, in this manner:

Stormont and Way.

Roll 740.

And when the roll is written on the back fide, you begin at the same distance from the top as before, and leave a like margin.

When regular, and where set aside, &c.

Judgment was figned against all the defendants in a joint action, though one of them never had notice either of the writ or declaration.—Rule to set aside nist. Whereupon it was shewed for cause, that a writ of enquiry was executed; and thereupon the motion came too late. But per cur. The judgment can never be good as to that defendant who was not served; and therefore the judgment, being joint, must be set aside as to all. Coulson v. Tumbul & al. Barnes 246.

Debt on judgment. Defendant moved to stay proceedings, pending error, which the court ordered, upon giving judgment in this action. Barnes 246. But note in B. R. The rule is to stay proceedings in such case, without giving

Judgment pending error.

If the plaintiff enters the appearance for defendant, he has no occasion to demand a plea of defendant's attorney; but on default thereof, in due time, he may sign judgment

Motion to set aside judgment in C. B. The irregularity complained of was, that the rule to plead was given before notice of the declaration being left in the office was served on the defendant, the appearance having been entered by plaintiff, and the proceeding according to the statute. It appeared, that plaintiff's attorney, finding his mistake, waived his judgment, struck out the old, and gave a new rule to plead, and after that was expired signed judgment: and the question was, Whether he could do so without leave of the court. Per cur. It is only one entry upon record, and the former judgment appears by the prothonotary's book to be signed by mistake, and the latter is regular. Barnes 251.

A judge's summons, for time to plead, was taken out and served after the rule for pleading expired, whereupon plaintiff signed judgment, and held regular. Barnes 252. The summons being unduly obtained after the rule expired.

After regular judgment signed, and set aside by the court, the desendant pleaded the statute of limitations, on which plaintiss moved to set it aside, and the rule was made absolute. The court never give leave to plead this plea after a regular judgment signed. Desendant must be bound to plead the general issue, unless in case of a fair and honest desence, where a justification is necessary. Barnes 253.

Summons for time to plead, and before the summons was renewed, or discharged, plaintiff's attorney signed judgment.

When regular, and where fet afide, &c.

Per cur. The judgment signed is irregular, without discharging the summons, and must be set aside. Brown v. Godfrey. Barnes 255.

If defendant pleads a plea not adapted to the action, judg-

ment may be figned. Barnes 257.

If he pleads by an attorney not of the court, such plea is a nullity, and judgment may be signed. Barnes 259.

Judgment may be given on a plea, where it amounts to a confession, notwithstanding the pleading over. Stra. 395.

Where a plea confesses the action, and does not sufficiently avoid it, judgment shall be given on the confession without regard to the verdict for defendant; and in such, case, a writ of enquiry shall issue. Stra. 873. Vide Carth.

In trespass, the defendant justified by virtue of an outlawry against the plaintiff, and an ill writ of levari. After verdict on an immaterial issue, for plaintiff, judgment was given on the confession, and a writ of enquiry awarded.

Jones v. Bodeens. Ld. Raym. 90, 924.

A regular judgment was set aside, on payment of costs, and pleading plene administravit, which (defendant being an administrator) was deemed as the general issue. Barnes 260.

Defendant, bound by an order to plead an issuable plea, pleaded, that plaintiff was an infant, and ought to sue by prochein amy, and not by attorney. Plaintiff's attorney, conceiving the plea a nullity, signed judgment; which the court refused to set aside; being of opinion, that it was a plea in abatement. An issuable plea is a plea in chief, upon which plaintiff may take issue. Was staff v. Long, one, &c. Barnes 263.

If defendant obtains a summons for time to plead, after an order for time to plead is expired, and actually before judgment signed, plaintiff ought not to sign judgment.

Barnes 265.

Order for time to plead, pleading issuably, rejoining gratis, and taking notice of trial within term; defendant pleaded accordingly; plaintiff replied; and then defendant, instead of rejoining, demurred, merely for delay. Plaintiff, not having time to set down the demurrer to be argued in term, signed judgment; on which defendant moved to set it aside. But, on shewing cause, the court thought defendant's practice a meer trick, and discharged the rule. By rejoining gratis, is meant, rejoining without the common four days rule to rejoin. Maurice v. Engier. Barnes 271.

When regular, and where set aside, &c.

After pleas pleaded, if plaintiff amends his declaration, the defendants may redeliver the same identical pleas if they chuse it. And judgment signed in such case for want of pleas de novo was set aside. Wilcox v. Sharpe. Barnes 273.

A plea must be demanded in writing, after declaration delivered with notice to plead, and rule to plead given, before plaintiff can sign judgment for want of a plea. Barnes 276.

Motion to set aside judgment, &c. entered by a warrant of attorney, which warrant desendant insisted was void, as being given in pursuance of an usurious contract, which is not pleadable to a scire sacias on the judgment. Plaintiff's council observed, that the pretended usury is subsequent to the judgment; and that usury for continuance does not avoid the first security, though a penalty of treble the value is given by action, &c. The court directed an issue to try the controverted sact, as to the usury. Machin v. Delaval.

Barnes 277.

Rule to shew cause, why the judgment should not be set asside, discharged. The objections were, that the desendant had never been served with copy of process, or notice of declaration. The answer was, that copy of the process had been tendered to the desendant at his house, who refusing to accept the same, it was lest there; and that, within sixteen days after such service of process, notice of a declaration was lest under the door of the said house, which was then empty and shut up. The court thought the shutting up of the house a trick of the desendant's to avoid the process, &c. By general rule, I Geo. 2. Notice of declaration is to be lest at desendant's last place of abode. Wood v. Dodgson. Barnes 278.

Attachment of privilege returnable Thursday next after 15 Hil. a copy whereof was served on desendant before the return; and on the return-day (30th January) a declaration was left at the office de bene esse, and notice to plead served on desendant: desendant, by the statute, having eight days to appear after the return of the writ, [i.e. exclusive of the return day] stayed till 7th of February, his last day for appearing, and then entered his appearance and pleaded a tender after his time for pleading given by said notice, but before the rule to plead, expired. Plaintist looked upon this plea as a nullity, because pleaded after the time for pleading expired, and after the rule to plead was out, and signed judgment, Desendant insisted, that his plea ought to be received any time before his time for appearing expired;

When regular, and where set aside, &c.

or any time before plaintiff was intitled to fign judgment for want of a plea. Interlocutory judgment fet aside the costs to attend the event of the cause. Barnard, one, &c.

v. Irwin. Barnes 278.

The plaintiff brought a re. fa. lo. returnable in Michaelmas last, and a pone returnable 8 Hil. last, whereupon defendant appeared, and plaintiff delivered a declaration the 8th of February last, intitled of Michaelmas instead of Hilary term; and, for want of a plea, signed judgment, and executed a writ of inquiry of damages last vacation upon two notices thereof, directed to the defendant Dethick and the other defendant respectively, and both lest at the house of Dethick. Desendant insisted, that he was intitled to an imparlance; but the question was not entered into. The court held the declaration, intitled of Michaelmas term, null and void. Rule absolute to set aside the judgment and inquiry. Costs to attend the event of trial. Cook v. Dethick and another. Barnes 274.

Defendants pleaded three pleas. After which, plaintiff amended his declaration, paid costs, gave a rule to plead, and demanded a plea. Defendants re-delivered their former pleas without a second application to the court or counsel. Plaintiff signed judgment for want of pleas de novo. Per cur. After an amendment of the declaration, desendant has liberty to plead de novo, that is, he may do so, if he thinks proper; but he is not obliged to vary from his first desence. Rule absolute to set aside the judgment.

Barnes 273.

An attorney's clerk entered up judgment in the name of a regular attorney, but without his knowledge or confent: and the court, on motion, fet it aside for irregularity.

Hopwood v. Adams. Burr. 4 pt. 2660.

The plaintiff voluntarily suffered himself to be non-suited; after which, he moved to set aside the non-suit, and for leave to reply de novo; but, on shewing cause, the court discharged the rule. He had replied, that the cause of action arose within six years, "which fact could not be proved; He wanted therefore to set aside the non-suit, and reply de novo," that the writ of latitat issued within the six years. The court said, that that would make quite a new question, which the plaintiff had before pretermitted, and had put the issue upon quite another soot, and upon a point which he could not establish. Hutchinson v. Brice. Burr. 4 pt. 2692.

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A S the defendant often, on being arrested, will give a warrant of attorney to confess judgment, upon time given him for payment of the debt, &c. the courts have taken care by rules that defendants in such situations shall

not be imposed on.

"No warrant of attorney for confessing a judgment executed by any person in custody of any sherist, or other officer, shall be of any force, unless some attorney for and on behalf of such person in custody, and expressy named by him, be present to inform him of the nature of such warrant, which attorney shall subscribe his name as a witness to the due execution thereof." East. 15 Car. 2. B. R.

And in C. B. by Reg. 14, 15 G. 2. "No Bailiff or sheriff's officer shall presume to exact or take from any perfon, being in his custody, any warrant to acknowledge a judgment, but in the presence of an attorney for the defendant, which attorney shall then subscribe his name thereunto; which said warrant shall be produced when the said judgment shall be acknowledged." And no attorney shall enter, or acknowledge or cause to be entered and acknowledged, any judgment by colour of any warrant gotten from any defendant being under arrest otherwise than as aforesaid.

The courts of B. R. and C. B. have both held, that the presence of an attorney, who is not an attorney of the same court, is sufficient. Stra. 530. 2 Barnes 36.

And by Reg. Trin. 14, 15 G. 2. in C. B. Every warrant of attorney for confessing a judgment in this court, shall be read over by the person who is to execute the same, or by some other person to him, before the execution thereof. And if judgment shall be entered up upon any such warrant of attorney which shall not be so read over as aforesaid, such judgment upon motion may be set aside as irregular."

If judgment on a warrant of attorney be not entered up within the year, the plaintiff must apply to the court for leave to enter up the judgment, making an affidavit of the due execution of the warrant, that the debt is unsatisfied, and the defendant living. Rep. and Cas. of Prast. C. P. 69. 2 Barnes 213. So in B. R. And if entered otherwise,

the court, on motion, will set it aside.

If a warrant of attorney to enter judgment be above a year old, and under ten years old, leave to enter judgment

may be given by a treasury rule [i. e. in C.B.]: but if the warrant be above ten years old, the court must be moved for leave to enter up judgment. If the warrant be under twenty years old, the common affidavit of the due execution thereof, that the debt is unpaid and parties living, is sufficient for an absolute rule. 2 Barnes 41.

But if the warrant be above twenty years old, the rule must be to shew cause, and served on the desendant. Barnes 27. Rep. and Gas. of Prast. G. P. 146. 2 Barnes 42.

37. Rep. and Caf. of Pract. C. P. 146. 2 Barnes 42.

The defendant was taken upon a ca. fa. and paid part of the debt, and gave a warrant of attorney to confess a new judgment for the rest, upon time given him to pay it. And this was held good without the presence of an attorney.

Stra. 1245.

If the defendant is arrefted, and in execution, and one becomes bound for him to the plaintiff, and the defendant gives him judgment for his counter-fecurity, it is good, though no attorney be present: and it is not within the common rule of the court, because it was not given to the person himself, [in which case there must be an attorney present] but to a third person. 5 Mod. 144. 1 Salk. 402. 6 Mod. 85, 163. 1 Mod. 1. Comb. 76, 424.

The reason of the rule, that the attorney of the desendant being under confinement, shall be present when he gives a warrant to confess judgment, is to avoid all practices on the part of the plaintiff, and to see that it is done without dures of imprisonment.—But that cause fails here, where the desendant is not in prison at the plaintiff's suit, nor abused by any artifice used by him. 2 Ld. Raym. 797.

Burr. 4 pt. 3 vol. 1793.

A man in custody, at the suit of another, may give a warrant of attorney to confess judgment, though his own attorney is not present. But some attorney ought to be present. Ld. Raym. 797.

By Reg. Pract. 4 Geo. 2. B. R. there must be an attorney present, on behalf of the defendant in custody, to make a

warrant of attorney to confess judgment, good.

The court fet aside a judgment entered upon a warrant of attorney given in Ireland, by the defendant, whilst in custody on mesne process, at the suit of the plaintist, because no attorney was present at the giving it, according to the rule, 4 Geo. 2. and said, it was an universal rule; and, that the plaintist, if he would make use of this court, must con-

form to its rules: comparing it to the case of stamping foreign deeds before they can be read here. Stra. 1247.

If an executor or administrator consesses judgment, or suffers it to go against him by default, he thereby admits assets in his hands; and is estopped to say the contrary in an action on such judgment suggesting a devastavit. Skelton v. Hawling, Exor. I Wilf. 258.

A man, after he has given a warrant to enter a judgment, cannot revoke it by the course of the court; and, if he endeavour to revoke it, yet notwithstanding, the court of King's Bench will give leave to the plaintiff to enter the judgment. 2 Ld. Raym. 850.

If a man gives a warrant of attorney to confess a judgment, and dies before the judgment is confessed, this is a countermand. 1 Vent. 310. Sed contra, Ld. Raym. 849.

But if he die in the vacation, the attorney may, before the effoign day of the subsequent term, enter up the judgment as of the precedent term. Ld. Raym. 776. Salk. 87. 2 Stra. 718, 882, 1081. Andr. 53. Barn. K. B. 357, 358, 404.

But the court will not give leave to enter up judgment, on a warrant of attorney, after the death of the plaintiff. Stra. 718.

On 11 Nov. motion to enter up judgment on an old warrant of attorney, on affidavit produced, sworn the day before, of the party's being alive, and the debt unpaid, on which the court made the common rule. On another day a motion was made to discharge this rule, upon an affidavit, that defendant died at seven o'clock in the morning of the day the first motion was made; and it was insisted, that this was a surprize on the court. However, the court declared, that if it had appeared, that the man was dead, they would not have made the rule; but they applied the maxim, fieri non debet, fastum valet to this case, and compared it to the cases in Salk. 82. and Fuller and Jocelyn. Stra. 882. and thus suffered the deceit put on them to prevail. Chancy v. Weedham. Stra. 1081.

Defendant gave a warrant of attorney to enter judgment at the suit of A. and one B. deceased. But leave was given only to enter judgment at the surviving plaintist's suit, upon his affidavit of the due execution of the warrant of attorney, that the debt was unpaid, and the defendant alive. Still v. Still. Barnes 40. But like motion was denied in another case. Barnes 45.

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A warrant of one executor is not sufficient to enter up judgment against the other, because it would be estopping the other from saying, that he is not executor; and, being without his knowledge, it might subject him to a devastavit

for the paying of other debts. Stra. 20.

A. and one B. deceased, gave a joint bond, and a warrant of attorney to enter up judgment against me, not us, though executed by two. Motion, on the common affidavit, for leave to enter up judgment against A. the survivor; and a case was quoted in B. R. 25. 6 Geo. 2. Todd v. Tod, where leave was given to enter up judgment at the suit of a surviving plaintiff. On which a rule to shew cause was granted, which was afterwards made absolute, on affidavit of service, no cause being shewn to the contrary. Gladwin v. Scot. Barnes 52.

Motion for leave to enter judgment upon an old warrant of attorney, on affidavit, that defendant, who refided at famaica, was living and in good health, and had been feen and conversed with there by the person who made the affidavit on the 13th September. He sailed soon after, and arrived

at London 15 January, granted. Barnes 256.

If a warrant of attorney is given to a feme fole, and she marries before judgment is entered up, application must be made to the court for leave to enter it up by the husband and wife, founded upon an affidavit, proving the marriage between the plaintiffs; and if entred up by the husband and wife otherwise, it is irregular. Burr. 4 pt. 3 vol. 1471.

If a feme fole gives a warrant of attorney to confess a judgment, and marries before it be entred, such marriage countermands the warrant, and judgment shall not be entered against the husband and wife, for that would charge the husband. East. 9 W. 3. B. R. anon. Salk. 117, 399.

A feme covert, who lived and acted as a feme fole, gave a warrant of attorney to confess judgment, &c. and afterwards moved to set the warrant aside, because she was covert. But the court would not relieve her on motion, and put her to her writ of error. Mich, 10 W. 3. B. R. anon. Salk. 400.

If a warrant of attorney be given after the continuance day, to enter up a judgment, as of the term preceding; this may be well enough, if it be dated within the term; but it cannot be so, if such a warrant be given to confess a judgment generally, and dated after the term. 1 Vent. 113.

If a warrant of attorney is given to confess a judgment to be entered of a certain term therein mentioned, judgment

can be entered only of that term. I Mod. I.

If a warrant be to confess judgment generally, without expressing any particular term, or does express, that it be entered of a particular term, or any term subsequent to it, judgment may be entred of any subsequent term: but if not entered within the first four terms, next after the date of the warrant, the court must be moved, for leave to enter the judgment, upon affidavit made of the due execution of the warrant of attorney, and that both parties are living, and the debt or part thereof is unsatisfied.

Motion for leave to enter up judgment on an old warrant of attorney, upon an affidavit, sworn by the plaintiff in Ireland, before a commissioner of the Common Pleas there, of the due execution of the warrant of attorney, that the defendant was living, and the debt unpaid. An affidavit also was produced, that the plaintiff lived in Ireland. But the court refused the plaintiff's affidavit, sworn as aforesaid,

to be read. Barnes 40.

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In ejectment, not guilty, and then relicia vereficatione confession to the action; and defendant's attorney subscribed the declaration accordingly. Motion, that plaintist might enter judgment for himself. But per cur'. Defendant's attorney ought to come in proper person before the master, and do it there. And though it was urged, he could not come, yet

the motion was denied. Ld. Raym. 345.

A motion was made to set aside an execution on a judgment, upon suggestion of an agreement between the parties, made after the judgment given, (viz.) that the judgment should be upon such and such terms. Per Holt, ch. just. Where a judgment is consessed upon terms, it being in effect but a conditional judgment, the court will lay their hands upon it, and see the terms performed; but where a judgment is acknowledged absolutely, and a subsequent agreement made, this does no way affect the judgment; and the court will take no notice of it, but put the party to his action on the agreement, and in this case the agreement being only under their hands, it is no ground for an audita querela, and the court cannot hold plea of an agreement upon a motion. Salk. 400.

A defendant, frequently after a declaration delivered, will, on the plaintiff's engaging to stay execution for a time, give judgment by cognovit actionem; and in case of trespass,

&c. confess damages by underwriting the declaration thus, "I acknowledge this action, and admit that the plaintiff

A. B. hath suftained damages to 50 1. &c."

Motion to enter satisfaction on the record of judgment in plaintiffs name, nunc pro tunc; plaintiff being dead, after executing a warrant of attorney to acknowledge satisfaction, and his administratrix become a lunatick, as appeared by the affidavit of a physician who attended her. After rule to shew cause, and no cause shewn, it was granted. Darlow v. Late Duke of Wharton. Barnes 258.

IF a party die pending argument or time taken by the court to consider, &c. the court, on motion, will give leave

to enter up judgment nunc pro tunc. Barnes 255.

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On motion for a new trial on the ground of a supposed missinection of the judge in admitting improper evidence, &c. In the interim, and whilst the question was depending in the court, (who took time to advise upon it) the desendant died; whereupon, the plaintist moved for leave to enter up judgment as of the next term after the verdits. Per cur. It is discretionary to grant it or not. 1 Sid. 462. Crispe and Jackson v. Mayor of Berwick in point. 1 Vent. 58, 90. S. C. in point. It seems reasonable. Take a rule to shew cause: And afterwards the rule was made absolute without desence. Tooker v. duke of Beaufort. Burr. 4 pt. 147.

So where pending argument on a special verdict, and time taken to consider, &c. the plaintiff died; on motion, the judgment was ordered to be entered as of the term in which the posses was returnable. Sir John Trelawney v.

Bp. of Winchester. Burr. 4 pt. 226.

By 17 Car. 2. c. 8. It is enacted, "That in all actions personal, real, or mixt, the death of either party, between the verdict and the judgment, shall not hereaster be alledged for error, so as such judgment be entered within two terms after such verdict."

And "where any judgment after a verdict shall be had, "by or in the name of any executor or administrator, in such case an administrator de bonis non, may sue forth a series facias, and take execution upon such judgment."

A rule was obtained by plaintiff, to shew cause why judgment should not be entered nunc pro tunc. Cause was tried at the sittings after Trinity, A. D. 1735. Defendant siled a bill, and got an injunction, which was dissolved the 19th of May, 1740. Then search was made for the postea, but it could not be found. And afterwards, 21st of June, 1740, defendant died. It appeared, that the bill in Chancery was brought in 1733, but the answer did not come in, till 1738, and a surther answer, not till 1739. Per cur. By the statute 17 Car. 2. Judgment may be entered within two terms after the verdict; and the death of the party, between verdict and judgment, shall not be assigned a rerror. B this case is not within the statute. The celay is pure the plaintiff's, and not occasioned by the court. Rule d charged. Barnes 261.

A warrant of attorney was given to confess judgment to two, and one died before judgment entered; and leave was given to the survivor to enter it up. Todd v. Dodd. B. R. 1 Wilf. 312. And see the cases there cited. But in Still v. Still, in C. B. 2 Barnes 38. held, that the power ought

strictly to be pursued, and motion denied.

The executor of A. moved for leave to enter up judgment at his own suit on a warrant of attorney, the words whereof extended to enter judgment at the suit of A. the testator, his heirs, executors, or administrators.—Rule was made absolute, (on assidavit of service) no cause being shewn. On moving this, the serjeant quoted a case in Salk. where a warrant of attorney to enter judgment was given to a seme sole, and she having married before the judgment entered, the court gave leave to enter the judgment at the suit of the husband and wise. Barnes 44.

Defendant died the 16th of February; judgment was figned the 21st, and the plaintiff revived the judgment by feire facias against the defendant's administrator; and after two nichils returned, execution was awarded. And on shewing cause against a rule to set aside the judgment, the court held, that all judgments must be taken to be pronounced in term time; and that signing judgment in the vacation following, though after the death of the party, is good. Rule discharged. Barnes 267. And cases there

cited.

Defendant died the 27th of September, 1743; and on the 1st of October next plaintiff figned judgment as of the precedent term, by virtue of a warrant of attorney, and then

executed a fi. fa. and held well. Barnes 268.

Defendant died the 20th of April, and on the 21st application was made on an affidavit sworn the 19th, for leave to enter judgment on an old warrant of attorney. Rule made, and judgment figned the 21st. On motion by the executors of defendant, to set aside the judgment, defendant being dead, before the rule made, and judgment signed, the court said, that if it had appeared to them, that the defendant had been dead, leave to enter judgment had not been given. But here there was no imposition on the court; and there was no difference between a warrant of attorney, under or above a year old, save that if under, judgment may be entered without, if above, not without leave of the court. The judgment, when signed, relates to the essential of the term present or preceding. The cases

cases are unisorm; and the court will adhere to sictions and relations, when they tend to promote justice. The old practice is altered by act of parliament only, with respect to the time from which judgments are to affect purchasers, and cited Fuller and Jocelyn. B. R. Mich. 4 G. 2. Chancy and Needham. Viner, title Judgment. 17 G. 2. B. R. Savill and Wiltshire. Barnes 270.

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A warrant was given plaintiff to enter up judgment as of Hilary term, which he neglected to do: and afterwards defendant died, and then plaintiff entered the judgment. Per Holt chief justice, The entry will be as of the last term; and so before defendant's death; and consequently, not erroneous. And such entry is the practice of the court. Odes v. Dr. Woodward. Ld. Raym. 766.

The plaintiff died after verdict, and before judgment was entered: Afterwards judgment was entered, and execution taken out by his representative, without a scire facias. And on motion to set aside the steri facias, it was held, that although the judgment was regularly entered, by the 17 Car. 2. yet the st. sa. issued irregularly, for there ought to have been a scire sacias: So the execution was set aside. Earl v. Brown. B. R. 1 Wilf. 302.

Judgment was pronounced in Trinity, 1767; and defendant died in October after. And on a rule to shew cause why judgment should not be entered as of Trinity term, the time when it was pronounced, the same was made absolute. Mayor of Norwich v. Berry. Hil. 9 Geo. 3. B. R. Burr. 4 pt. 4 Vol. 2277.

Leave granted to enter judgment on an old warrant of attorney in Michaelmas term, on affidavit that defendant was living in Ireland on the 18th of September preceding, as a reasonable length of time for the distance. Barnes 53, 54.

By 8 & 9 W. 3. c. 11. f. 6. It is enacted, "That if any plaintiff happen to die after an interlocutory judgment, and before a final judgment obtained in the cause, the said action shall not abate by reason thereof, if such action might be originally prosecuted or maintained by the executors or administrators of such plaintiff. And if the defendant die

"after such interlocutory judgment, and before final judg"ment therein obtained, the said action shall not abate, if
"fuch action might be originally prosecuted or maintained

" against the executors or administrators of such defendant.
And the plaintiff, or if he be dead after such interlocutory

" judgment, his executors or administrators shall, and may,

" have a feire facias against the defendant, if living after

" fuch interlocutory judgment; or if he died after, then against his executors or administrators, to shew cause why

damages in such action should not be affested or recover-

" ed, &c."

The defendant died, after the rule to plead was out; but before the time, in a judges order, for time to plead, had expired, and the plaintiff figned an interlocutory judgment, and took out a feire facias against the defendant's executors, &c. But the court, on motion to set aside the proceedings, held this not within the act, and set aside the judgment, &c. as irregular, as the writ was abated by the death of the defendant. 1 Wilf. 315. Wallop and Irwin.

So in Sibert v. Executor of general Russel. Mich. 9 Geo. 2. where it appeared the general died at Bath a day or two before the time for pleading was out. Lord Hardwicke and

the court held the fuit abated.

But where defendant died, after enquiry executed, and before final judgment, the court held it within the act. Pract. Reg. C. B. 376.

The difference between the 17 Car. 2. c. 8. and 8 & 9 W. 3. c. 11.—The former relates to the death of either party, between verdial and judgment; the latter, to the death of either party, after an interlocutory and before final judgment.

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If the party would arrest the judgment, after verdist or inquisition of damages, a motion must be made for a rule to bring the postea, or inquisition, into court, a copy of which must be served on the attorney of the other side, of which an affidavit must be made, and annexed to that of sacts whereon the motion in arrest of judgment is grounded.

This rule in B. R. must be drawn up at the clerk of the rules office, for which 5 s. is paid — in C. B. with the fecondary.

It is against the ancient course of the court to make a rule to stay judgment, unless the postea be brought in; but the court, if there be probable cause shewn, will order the postea to be brought in. Instead of giving notice to the other side, the better way is to give a rule upon the postea for bringing it into court; for that is a notice of itself. Wood v. Shephard. Salk. 78.

The defendant, within the four days, has liberty to move the court in arrest of judgment.

Judgment can never be arrested, but for that which appears upon the record itself. Ld. Raym. 232.

After judgment on demurrer, there can be no motion to arrest the judgment, as the court will not suffer any one to tell them, that the judgment they gave, on mature deliberation, is wrong—but otherwise in case of judgment by default, for that is not given in so solemn a manner; or, if the fault arises on the writ of enquiry, or verdict, for there the party cannot alledge it before. Edwards and Blunt.

Stra. 125. Heavy Gedfrey. Mich & Gen. 2.

Stra. 425. Haw v. Godfrey. Mich. 4 Geo. 2.

Per Buller, justice of B. R. In Burt v. Barlow, East. 19

Geo. 3. a motion to arrest a judgment may be made on the

fifth day in term, because the four days are exclusive; but in

cases of new trial, the four days are inclusive.

Judgment shall not be lightly arrested, after a verdict. Burr. 4 pt. 3 vol. 1725-1729.

The court will not intend any thing, to overturn a judgment. Ibid.

The court will, after a verdiet, over-rule an objection, which they would have liftened to upon demurrer.

Note—An inferior court may set aside an interlocutory judgment, in two cases, viz. for irregularity, and, to let in a trial of the merits, even though the judgment were regular. Bur. 4 pt. 1 vol. 571, 2.—But such court cannot set aside a judgment after a verdict upon the merits, though it may even after verdict, for irregularity. Ibid.

Defendant

Defendant moved in arrest of judgment, the last day of term, but had no affidavit of notice of the motion. court made the common rule to stay the entry of final judgment, till cause shewn; but declared, that, for the future, they would never make a rule to ftay the entry of final judgment, upon motion in arrest, the last day of term, without

notice. Barnes 247.

In trespass and assault, after verdict for plaintiff, defendant moved in arrest of judgment; objecting, that the whole declaration was a meer recital, and nothing positive was aversed, the word "whereas" being inferted in the beginning of the count.—On shewing cause, the court were of opinion, that they ought to get over the old cases, and not, through this nicety, fet aside the verdict and defeat justice: -On a special demurrer, the objection would have been good; but, after damages found, by reason of the assault, the defect is cured. Rule discharged. Barnes 452.

So in B. R. a like motion; but on plaintiff's filing a bill right, the time of filing which the court would not enquire into, the court ordered the amendment, and said, that for want of applying to amend, many judgments had been ar-

rested for the same cause. · Stra. 1151, 1162.

Action on the case, wherein plaintiff declared, that she being fingle, and defendant affirming himself to be fingle also, prevailed on plaintiff to marry him; when, in truth, he had been before married to another woman, viz. A. B. who was still living, per quod plaintiff lost her chastity .-After verdict, and 2000 l. damages, defendant moved in arrest of judgment, infisting, that the crime was made felony by statute Jac. 1. and that the action is merged in the felony. The court directed the entry of judgment upon the verdict to be stayed till further order. Proctor v. Bury, Barnes 450.

Action of debt, on bond, by the administrator of the executor—the defendant pleaded non est factum, issue, and verdict for plaintiff. - Judgment arrested, because the action did not lie by the administrator of the executor; but, there should have been an administration de bonis testatoris non ad-

ministratis.

nistratis. Barnes 444.
Trespass against two. One let judgment go by default; the other justified, and, on trial, had a verdict. On motion, in arrest of judgment, it was infished, the rule ought to be discharged; because a tort differs from a contract; for if in covenant against two, if one pleads a plea that goes to

the whole, and on issue joined it be found for him; and the other lets interlocutory judgment go by default, the plaintiff cannot have final judgment against him, according to 1 Lev. 63, But says that case, in trespass, one defendant may be guilty, the other not, But held, that if in a plea personal against divers, one pleads in bar to parcel, or which extends only to him that pleads it; and the other pleads a plea that goes to the whole; the last shall be tried first, because it goes to the whole, and the other shall have the advantage of it; for in personal actions, the discharge of one is the discharge of both; and no judgment can be given against the other desendant, because it appears, the plaintiff had no cause of action. Judgment arrested. 2 Ld. Raym.

Where an issue is only misjoined, judgment shall not be arrested after verdict, it being cured by the express words of the statute of jeofails, 32 Hen. 8. c. 30. But where the cause is carried down without any similiter, that is fatal, and not amendable, and therefore judgment will be arrested, there being no issue at all; and the party thereby precluded from demurring, which he might do, instead of adding the similiter; and therefore, on motion for leave to amend this desect, after motion in arrest of judgment, the court re-

fused it. Stra. 641.

The plaintiff's goods distrained were not replevied, but, by consent of the attornies on both sides, remained in the distrainor's hands, and without any writ of re. fa. lo. or appearance in this court, plaintiff declared, defendants avowed; and after long special pleadings, and after trial of the issues at the assizes, and a verdict for plaintiff, the avowants moved to set aside all the proceedings, and the rule for that purpose was made absolute. The court held the agreement to be void; a fraud upon the revenue and officers, and an abuse of the court and the bar, that they had no jurisdiction, and consequently could not give judgment. Barnes 451.

If on a plea in abatement a respondeas ouster is awarded, and afterwards desendant pleads in chief, and there is a verdict for plaintiff; yet if the plea in abatement does not appear to have been entered on the nist prius record, judgment will be arrested; for, it being entred on the plea roll (which was in court) it must be mentioned in the nist prius roll, otherwise it does not appear that it was a verdict in the same cause. Carth. 447. 5 Mod. 399. Ld. Raym. 329.

The

The plaintiff, on an issue tendered by the defendant, joined the issue thus, "and the aforesaid defendant doth the like;" instead of saying, "and the aforesaid plaintiff doth the like." And this being objected in arrest of judgment, the objection was over-ruled, and the judgment established.

Harvey v. Peake, Burr. 4 pt. 1793.

So where in debt on bond, the defendant pleaded folvit ad diem, and concluded, " and this he prays may be enquired of by the country." To which the plaintiff subjoined, " and the aforesaid defendant doth the like;" and on motion, in arrest of judgment, this objection was over-ruled. Rawbone v. Hickman, 9 Geo. 1. cited in the above case of Harvey v. Peake.

After verdict for plaintiff, several objections were made in arrest of judgment: 1. That though the action was trespass upon the case, the jurata, at the foot of the record of niss prius, was trespass only. 2. That instead of saying, unless the chief justice should come before on the 12th of July; it was, unless he should come before the 12 of July. 3. I hat two of the defendants being theriff of Middlefex, the venire was awarded to the coroners; but, by the jurata, the writ was alledged to be delivered to the sheriff to be executed. 4. That the venire facias, instead of being returnable in court, was made returnable before the chief justice. 5. That the declaration recited an original against James Brooke and others, and counted against the said John Brooke. As to the first objection, the court held it to be helped by the statutes of jeo-As to the second, by the writ of bab. corp. jur. the day of trial was rightly appointed, and the jurata is amendable by that writ. As to the third, the venire facias appeared to be returned by the coroners, and the jurata is only wrong by misprision of the clerk. The return of the ve. fa. though defective, is within the flatutes of jeofails and amendments. And, as to the last, the word John, in the declaration, must be rejected, and the count will stand against the said Brooke, which must be the James Brooke before mentioned. The feveral amendments were ordered, and rule to stay the judgment discharged; but the plaintiff's attorney to pay costs for having made so many blunders. Fawke v. Horabin & al', Barnes 11.

Upon an issue joined in an action of debt in B. R. there was a verdict for the plaintist; and it was moved, in arrest of judgment, because the distringas was de placito, with a blank, omitting debiti. The venire facias was right. But, the court held the distringas amendable, and over-ruled the

objection. And per Holt, ch. just. The judge of nist prius's authority is not by the distringus, but by the commission of affize; for that by the statute of nist prius, 13 Ed. 1. c. 30. which gives the trial by nist prius, it is to be before judges of affize; and the distringus is only to bring the jury before them: and, at first, trials by niss prius were had upon the venire facias; and by that statute, the clause of niss prius is expresly ordered to be inserted in the venire facias. Then came the stat. 42 Ed. 3. c. 11. and ordered, that no inquests, but affizes and deliverances of gaols, should be taken by writ of nist prius, nor in other manner, before that the names of all them that shall pass in the same inquests be returned into court. And, by reason of that statute, trials by nist prius came to be upon the distringas; and the intent of that statute was, that by the jury being returned of record in court, the party might see the panel, and prepare himself to make his challenges. And per Powel, just. Another reason of trials being had upon the distringas, was, to prevent an inconvenience that was frequent heretofore, for the defendants to cast an essoign at nist prius, when all was ready for trial; for defendants being, by the statute of Marlb. c. 13. to have but one effoign after iffue joined; and upon the return of the venire facias, when the trial was not had upon that; but that was returnable above, the defendant must be effoigned above, and could have no effoign below upon the distringus, and so the mischief was helped. Vide Bullock v. Parsons, Ld. Raym. 1143.

Note: There is a difference between no distringus, and a bad one; in the first, the want of a distringus is helped by

the flatutes of jeofails, but otherwise in the laft.

Df new Trials.

If the party against whom a verdict is obtained on trial, or judgment on enquiry of damages, wishes for a new trial on inquisition, he must move for the same within the four days, or before final judgment be signed. The motion must be made in the court supported by an affidavit of facts.

If a new trial or inquisition be denied, the party may afterwards move, on a similar affidavit, to arrest the judgment but if a motion in arrest of judgment be first made and refused, you cannot afterwards move for a new trial.

The four days for motions for new trials are inclusive, but in arrest of judgment exclusive. Burt v. Barlow. B. R. 19

Geo. 3.

In C. B. a motion for a new trial cannot be made after the appearance day of the return of the habeas corpora juratorum, unless the foundation of the motion be some matter

discovered afterwards.

Where verdicts have been given contrary to evidence, or where there hath been no evidence at all to support such verdicts, the court hath granted new trials; but if there hath been a contrariety of evidence on both sides, the courts have never granted new trials, notwithstanding the judge (before whom the cause was tried) hath been of opinion, that the strength and weight of evidence was against the verdict. Per Wilmet ch. just. 3 Wils. 47. 1 Wils. 22.

A juror on the principal panel was challenged, and afterwards fworn on the tales by a wrong name; and though no fault was found with the verdict, yet the court granted a new trial. Parker v. Thornton. Stra. 629. Ld. Raym. 1410.

The courts never grant a new trial in penal actions.

Wilf. 59.

The courts will grant a new trial where there has been excessive damages given, but never where the damages have

been thought to be small. 2 Stra. 1051.

If a new trial be granted for excessive damages, and the same damages are given again, the court will never grant a third trial. Stra. 692.

If in an action against two, one be acquitted, and the other found guilty, that defendant can have no new trial.

Stra. 814.

A new trial may be granted a fecond time, if the reasons for granting it are sufficient. Per cur. in Goodwin v. Gibbons one, &c. Burr. 4 pt. 2108.

New

New trials may be granted in ejectments, and after a trial at bar. Stra. 1105. 4 Burr. 4 vol. 2224. 2225. Ld. Raym.

1358.

The court granted a new trial, because the verdict in a city was contrary to evidence, but refused to let it be tried by a jury of the county, till there had been a second verdict, altho it was sworn that there was no possibility of a fair trial. Anon.

In a declaration there was one count, that defendant gave a bribe, and another for corrupting by P. W.—Evidence was of corrupting by P. W. but verdict was for the plaintiff on the first count, and for defendant on the last; and the court granted a new trial, as being against evidence, though they admitted, that if there had been only one count, it would have been good. Anon.

A writ of enquiry was set aside, because 100 l. was given, when the defendant swore, that there was not 5 s. damages,

which the plaintiff did not deny. B. R. Anon.

The court will never grant a new trial upon the application of a party for want of evidence which he might have produced at the trial. Gooke v. Berry. B. R. I Wilf. 98.

The cause was at issue, and the record of nist prius, habeas corpora and jurata, were all made up for trial at a certain sittings; but the cause not coming on to be tried at that day, the plaintist's attorney ought to have altered the record of nist prius, writ and jurata, for a future day of sitting, but neglected so to do, or to reseal the same, although apprized thereof; so the cause was tried at a suture day; and it appeared on the sace of the jurata, &c. that the cause was tried after the day of nist prius mentioned therein, and a verdict was for the plaintist: and afterwards plaintist moved to amend the habeas corpora and the jurata, and defendant moved to set aside the verdict. On shewing cause why the amendment should not be made, the court were clearly of opinion, that the trial was coram non judice, and discharged the rule; but awarded ex officio a venire de novo. 2 Wils. 144.

The court will never grant a new trial against the equity of the case, though the verdict be against evidence. Anon.

B. R. nor in hard actions.

A motion was made for a new trial in an action of crim. con. grounded on an affidavit, that the plaintiff was before married to another, then alive; and because the witness was of an infamous character. Per cur. This should have been proved, and is no ground for a new trial. Anon.

The courts will grant a new trial for misdirection of the judge who tried the cause in point of evidence. 2 Wilf.

273.

After a verdict on the honest and just side of the cause, the court will support it if possible, and not grant a new trial. Gossin v. Wilcock. C. B. 2 Wils. 302.

A new trial was granted, although there was evidence on both fides, because all the witnesses subscribing to a release were not called and examined at the trial. 3 Wilf. 38.

On two issues in covenant, one was clearly with the defendant, on the other a contrariety of evidence, and verdict for defendant, although, in the opinion of the judge, the weight of evidence was with the plaintiff. New trial resustant ed. Per Wilmot ch. just. It could not have been sent to be tried again upon one of the issues, but it must have gone back on the whole record, viz. upon both the issues, and as one issue is clearly with the desendant, there is no pretence or foundation for a new trial on that issue; and he cited Rowland v. Vanklaken. C. B. East. Term. 1 Geo. 1. from J. Tracy's notes, where it was so determined. Vide Barnes 436.

One issue out of four was against evidence, and the court granted a new trial, not only as to that issue (for that they said cannot be) but for the whole. Rex v. Pool. East. 1734.

In such case the issue found must be a material one: sor if out of three issues two were found against evidence, yet is the material issue in the cause be agreeable to evidence, the court will not grant a new trial. Dexter v. Barrowby. East.

25 Geo. 2.

In an action for a libel, the jury found a verdict for defendant, which the judge reported to be against evidence; but said, he should have been satisfied with half a crown damages. Whereupon B. R. refused a new trial; saying, it was no matter of contract, no special damages laid or proved, but only a vindictive action; and courts of justice are not to affish the passions of mankind. Burton v. Thompoon. Mich. 32 Geo. 2.

The courts will never grant a new trial, because the verdict was taken on a wrong count, unless some injury would

otherwise ensue. B. R. Anon.

After a nonfuit by order of the judge at nisi prius improperly, the court granted a new trial without costs. 3 Wil.

146. 338.

In ejectment the courts will feldom grant a new trial where the verdict is for the defendant, because the plaintiff may bring a new ejectment; but where it is for the plaintiff a new trial is often granted, for the consequence of not granting a new trial is the alteration of the possession of the premisses.

The

The court set aside a writ of enquiry because the jury was

returned by the plaintiff's attorney. Anon. B. R.

In an action for false imprisonment of a tavern-keeper for a few hours, 300 l. damages were given by the jury, which the court thought not excessive, and resuled to grant a new trial. 2 Wilf. 160.

In a like action for imprisonment of a journeyman printer for about fix hours, 300 l. was thought not excessive dama-

ges, and new trial refused. 2 Wilf. 205.

In a like action against the king's messengers for imprisoning plaintiff (an attorney) for fix days, and for entering his house, and rummaging his desks, books, and papers, under a secretary of state's warrant, 1000 l. damages not thought excessive, and a new trial refused. 2 Wilf. 244.

In a little affault and battery, in a dispute about the property of a turtle, between two gentlemen, citizens, 200 l. damages not thought excessive, and a new trial refused.

2 Will. 252.

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In an action for debauching plaintiff's daughter per quod, Ge. the court refused a new trial; moved for on account of

excessive damages. Anon.

The plaintiff, a baronet and member of parliament, recovered 10,000 l. damages in an action on the case for a malicious profecution, viz. indicting and trying him for felony at the Old Baily. The court, on motion for a new trial, on account of excessive damages, refused to grant it. Sir Alexander Leith v. Pope. Mich. 20 G. 3. C. B.

Five hundred pounds damages were given in an action for erim. con. defendant being a clerk only in an office during pleafure, at 50 l. per annum. New trial refused. And the court faid, new trials are never granted in cases turning upon circumstances, which are strictly and properly within the province

of the jury. Burr. 4 pt. 1 Vol. 609.

A new trial was granted, because a material letter was

discovered after the trial. Anon. B. R.

Though the ground of a verdict for the plaintiff be wrong, yet if no injustice be done to the defendant, or if the plaintiff can by another form of action recover as much, the court will not grant a new trial: - But otherwise, where injustice is done him by it, and if it be not clear that the plaintiff may recover as much by another form of action. 4 Burr. 2 Vol. 936.

The court will not grant a new trial, even where the jury have found for the defendant against evidence, if the plaintiff appears to have received no real injury, and the damages (if the verdict had been for the plaintiff) would

have been but a mere trifle. 4 Burr. 2 Vol. 665. VOL. I. Exceffive

Excessive damages were given on a writ of enquiry, for a militia-man against his colonel, who had ordered him twenty lashes; but the court would not set it aside, because the colonel had acted arbitrarily, malo animo, and was well able

to pay them: 4 Burr. 3 Vol. 1846.

There was a verdict, and new trial granted, and then the record of nift prius was made up with an appearance and plea of a different term from the former record, and verdict again for the plaintiff; -which, on motion, was fet afide, it not being the same issue that was directed to be tried again. And though a new trial was granted, yet it ought to be upon the old plea. Harper v. Davy. B. R. Ld. Ray. 510. Carth. 498.

A new trial is feldom granted but upon payment of costs:

but this is in the discretion of the court.

The court will not grant a new trial, after the merits have been tried, though the pleadings are not so proper as they might have been.

A new trial was granted, because the foreman of the jury had declared, that the plaintiff should never have a verdict.

Salk. 645.

Where a new trial is granted for misbehaviour of the jury, it should be certified on record by the judge.

Verdict for the plaintiff,—and on motion for a new trial, the court were divided in opinion; and therefore, no rule being made, plaintiff was at liberty to fign final judgment.

Cartledge v. Eyles, bart. Barnes 442.

The cause was tried before a judge of another court, and on motion for a new trial, suggesting the verdict to be against evidence, relying on the judge's certificate. Per cur. In this case, it being tried before a judge of another court, an affidavit of what passed at the trial must be produced as a necessary foundation for this motion. Barnes 447.

If the sheriff, on the execution of a writ of enquiry, admits improper evidence to be given, whereby the damages are lessened, the court will set aside the inquisition, and give plaintiff leave to execute a new writ of enquiry.

Vide Barnes 448.

A verdict was set aside, because one person answered to another's name, and was sworn a juror. Barnes 453, 455. - The verdict by eleven jurors only, is no verdict, and not amendable. When a fuit is referved at ni. pri. for the opinion of the court, which is a practice introduced in lieu of a special verdict, the verdict ought always to be for the plaintiff. And the rule of nist prius ought to be to the following effect, That if the court should be of opinion for the defendant, that then judgment of nonfuit should be entered, otherwise the defendant could have no remedy in

case of the plaintiff's death. Barnes 450.

The venire facias was awarded by mistake, returnable on the morrow of the ascension, instead of eight days of the purification. The defendants, though their witnesses attended the assignment of the affizes, made no defence at the trial, but confessed lease, entry, and ouster, and suffered plaintiss to take a verdict, relying on the mistake in awarding the venire, returnable at a day subsequent to the assize, till after which return, and default made by the jurors, there could be no niss prius. The jury process was made returnable at a proper day. And, on motion, the court held the variance material on the authority of two cases cited by the plaintiss's counsel. Bastard v. As against Bartlett. Trin. 3 Geo. 2.—Dale against Holmes. Mich. 4 G. 2. in B. R. Verdict set asside on payment of costs. Barnes 460.

Want of due notice is a proper ground for a motion for a new trial: But the defendant is precluded, if he appear

at the trial, and makes defence. Salk. 646.

A material witness for defendant conceased himself in the plaintiff's house, to avoid being served with a fubpæna, by which the plaintiff obtained a verdict; but the court set it aside without costs, it being unreasonable for the plaintiff to carry the cause down to trial, when she knew the desendant could not make a desence. Montpesson v. Randle.

H. 20 Geo. 2. Bull. Ni. Pri. 328.

On motion for a new trial, the usual way is to grant a rule to shew cause; and then the puisne judge of the court speaks to the judge who tried the cause, (if of another court) and obtains a report from him of the trial; and also a signification of his sentiments on it. If the judge declares himself satisfied with the verdict, it hath been usual not to grant a new trial, on account of its being a verdict against evidence. On the other hand, if he declares himself distaissied with the verdict, it is pretty much of course to grant it.

If a verdict is set aside, and a new trial granted, there is no occasion to have the record of nist prius re-sealed, or to have fresh stamps; for the king having been once satisfied for the duty on the record, no other need be paid, as it is not compleat till judgment entered up, and the first verdict not being satisfactory to the court, is quite expunged;

and the record remains as if no trial had ever been.

B. R.

Of docquetting the Judgment Rolls and carrying in the Rolls.

HEN the roll, containing all the proceedings had in the cause, with the final judgment had thereupon, is made out in manner before-mentioned, under the "title judgment, how to be entered," the same ought regularly to be filed in the treasury of the court, that it may

be referred to on occasion.

And for the better finding the same, a docquet thereof must be left with the clerk of the judgments, who enters the same in alphabetical order, by the defendant's surname, in a book kept by him for that purpose. To make this docquet, you get a number for your roll, from the nist prius office, in Cary-street. The docquet paper is drawn as under

The entry of A. B. gentleman, of Michaelmas term, 20 Geo. 3.

Middlesex, &c. Judgment in case (or whatever it is) between John Box, plaintiff, and William Maule, defendant, for 50 l. damages, and costs, 21 l. 10 s.

And if the attorney has more to enter, they are entered in due order.

This paper, with the roll, which is numbered at the bottom in this manner:

Stormont and Way.

Roll 7c8.

is taken to the clerk of the judgments, who marks the roll, pay for docquetting three shillings, and then carry it to the nisi prius office in Gray's-Inn, where it is to be filed in the treasury.

Vide the opposite page. The Stat. 4 &5 W. & M. c.

20.

In the margin of the roll, the actual day of figning the judgment must be put,

By

Of docquetting the Judgment Rolls and carrying in the Rolls.

THE same in this court.

When the roll is carried in to the prothonotary, you must docquet the same on the common docquet, in the office, in this manner:

Not informed in debt, [as the case is]

Middlesex. Lickbarrow for Thompson. Roll. 403.

And if the attorney has more rolls to enter in the fame county, he enters them in successive order.

Says nothing in cafe.

Middlesex. Same for James. Roll. 431.

Upon receipt of the rolls, the prothonotary delivers the fame over to the clerk of the warrants, who is to inspect the same, and estreat all fines and amerciaments against sheriffs and others, that he shall find amongst the said rolls, and then to deliver them to the clerk of the esseigns, who docquets them, binds them up, and carries them to the treafury at Westminster.

The stat. 4 & 5 W. & M. c. 20. entitled, "An act for the better discovery of judgments in the courts of King's Bench, Common Pleas, and Exchequer, at Westminster—

Provides first, in what manner, and at what time, judgments shall be docquetted, by the respective officers, in books for that purpose, that the same may be searched for by any one, paying for the same; and upon neglect of the Y?

226 Of doquetting the Judgment Rolls, B.R. and carrying in the Rolls.

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By Reg. Mich. 5 Ann, Attornies shall bring in the rolls of every Trinity, Michaelmas, and Hilary terms, and file the same before the essoign day of the subsequent term; and the rolls of every Easter term before the first day of the subsequent Trinity term.

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But the euftes brevium, in indulgence of the clerk, attends the day but one before every term, to receive and file the rolls. He used, formerly, to attend the day before Trinity term, for that purpose; but now he attends only the day but one before Trinity term to receive and file their rolls.

Defendant gave a warrant of attorney to confess judgment, and died within a year after, in time of vacation, before the effoign day of the subsequent term, which was Easter. The attorney, after his death, entered up the judgment as of the precedent term Hilary; but did not bring in the roll before the effoign day of Easter term; and, on motion to fet it aside, the court held the judgment to be regularly figned, as of the precedent term, as the party died in the vacation, and it was a good judgment of such precedent term, though it would not affect purchasors, but from the time of figning. But as the roll was not brought in and docquetted before the effoign day of the subsequent term, it was irregular. For per cur. By the course and practice of the court, all the rolls of Hilary ought to be brought in before the effoign day of Easter term, and made part of the bundle of Hilary; and it is for this reason, that what is done in vacation is looked upon as the act of the term preceding; and there cannot be a post terminum roll, received, without leave, upon motion, which the court does not grant, but when it appears, that no one will be prejudiced. For if this were to be allowed, the statute of frauds, and the statute of king William for docquetting judgments, would be frustrated; and therefore they difallowed the filing it. Odes and Woodward, Salk. 87. Ld. Raym. 448. If

C.B. Of docqueting the Judgment Rolls, 327 and carrying in the Rolls.

officer, in such case, gives the penalty of one hundred pounds, half to the party grieved, and the other half to any

one who shall sue for the same, &c.

And by fect. 3. "No judgment, not docquetted, and entered in the books, as aforefaid, shall affect any lands or tenements, as to purchasors or mortgagees, or have any preference against heirs, executors, and administrators, in their administration of their ancestors, testators, or intestates estates.

And by sect. 4. gives the clerks of the judgments four pence, over and above their usual sees for their trouble.

Pasch. 5 W. & M. 6 Jac. 1. The several and respective officers of this court shall deliver in all their rolls of Trinity, Michaelmas and Hilary terms, to the clerk of the essential efficients, before the essential efficients, upon or before the first day of Trinity term following: and the officer who shall not bring or send in all his rolls of the said several terms, at the times aforesaid, shall pay to the clerk of the essoigns for every roll brought in after the sum of 12 d.

The plea-rolls of every term shall be brought in to the clerk of the essoigns three weeks after the end of the term sollowing; and in default thereof, there shall be likewise paid to the clerk of the essoigns, for every plea roll brought in

hod in the vacation, and the way to good recedent term, though it would not a

afterwards, 12 d. Pasch. 5 W. & M.

328 Of docquetting the Judgment Rolls, B. R. and carrying in the Rolls.

If the rall is already carried in, which is often the case after issue joined, and before trial, and which the desendant may compel the plaintiff to do by serving him with a rule to enter the issue, the poster or inquisition, with the master's allocatur of costs thereupon, is carried to the clerks of the nist prius office, and they will enter up the judgment on the roll.

On motion, a new roll was ordered to be filed, the former being lost; for there being a docquet of it made before it was lost, it could be no deceit on purchasors. Stra. 833.

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It was the seamen roles to the rolls of the rolls of the seamen to the problematuri; selection of the common selection when the common selection is the like note from the seamen, or clerk of this seamen, or clerk of this seamen, or clerk of this seamen, and other office to the seamen to such rolls.

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C. B. Of docqueting the Judgment Rolls. 329 and carrying in the Rolls.

Every attorney that shall receive any roll, either plea or common, from the respective prothonotaries of this court, shall sign, and set his name to such prothonatory's book, from whom he shall receive the same; and no prothonotary shall deliver any roll, but to the proper hand of some known attorney, or clerk of their respective offices. Pas. 34 Car. 2.

No attorney shall carry any rolls of this court into the country. Pas. 12 Jac. 1. Mich. 1649. Mich. 1654. Pas.

34 Car. 2.

Every attorney of this court, that shall receive any roll or rolls as aforesaid, plea or common, of any Easter term, shall bring the same into the office from whence he received it on or before the first day of the next Trinity term.

And the rolls received of any Trinity term, shall be brought into such office, on or before the feast day of St. Michael

the archangel next ensuing the same term.

And the rolls received of any Michaelmas term, shall be brought into such office, on or before the fixth day of January next ensuing.

And the rolls received of any Hilary term, shall be brought into such office by the space of four days before the feast day of Easter next after the said term. Pas. 34 Car. 2.

The prothonotaries, on delivering the common rolls to the clerk of the warrants, are also to deliver a note of the rolls that are wanting: the same note to be subscribed by the clerk of the warrants, and redelivered to the prothonotary; and the clerk of the warrants, on delivering over the common rolls to the clerk of the essigns, is to take the like note from the clerk of the essigns of the rolls wanting. Mich. 1654.

The clerk of the essigns shall not deliver out any post rolls, or other rolls of this court, to any attorney or clerk of this court, but to the respective prothonotaries, and other officers of this court, that have a right to such rolls. Pas.

34 Car. 2.

The clerk of the efficients shall, a fortnight within every term, lay before the court an account of what rolls are wanting, that ought to have been brought in according to the said rules, together with the attornies names who took them out of the said offices, that this court may proceed as they shall think sit, against such persons as shall not have brought in their rolls according to the said rules. Tr. 2 Geo. 1.

Df Execution.

HEN judgment is figned, the plaintiff is at li-

An execution is founded upon the judgment, and is a writ directed to the sheriff, from the court in which the judgment was given; and is supposed to be granted at the request of the party at whose suit it is, to give him satisfaction of the judgment which he has obtained.

There are three forts of executions generally in use at this day, upon judgments in personal actions, either of which the party has his election to follow; but he cannot pursue

two forts of execution at one and the same time.

The highest fort of execution, which can be taken out, is that of a capias ad satisfaciendum:

The fecond, an elegit; And the third, a fieri facias.

The capias ad fatisfaciendum, is a writ directed to the sheriff, commanding him to apprehend the defendant, and thereby he may be deprived of his liberty, till he make the satisfaction awarded—For neither the sheriff nor the court can admit him to bail; and therefore, when he is once in custody upon this writ, no other fort of execution can be sued by the plaintiff against his property. But if he should happen to die, while charged in execution upon this writ, the plaintiff may, [by the stat. 21 Jac. 1. c. 24.] after his death, sue out other execution against his lands, goods or chattels, at his election.

This writ, as well as any other executory process, may be sued out also for costs obtained by the defendant against the plaintiff, where a judgment of non-pros, or nonsuit,

&c. is had against him.

Regularly the writ of capias ad satisfaciendum cannot be, fued out after the judgment, in a personal action, but where a capias ad respondendum was the original process, [3 Co. 12. 2.] and that was anciently in actions of trespas vi et armis only; but as a capias ad respondendum has been given by various statutes to almost every personal action, prosecuted by original writ, a capias ad satisfaciendum has become an executory process in them also.

So upon all actions by bill in B. R. a capias ad fatisfa-

ciendum lies in execution.

The elegit (so called, because it is in the election of the plaintiff to sue it out or not) was given as an executory process, by the statute Western. 2. c. 18. By this writ, the sheriff is commanded to take and deliver to the plaintiff, the defendant's goods and chattels upon reasonable appraise-

ment and price; (except his oxen and beafts of the plough) and if his goods and chattles are not sufficient to satisfy the debt or damages awarded, then the moiety of his lands and tenements, which he had at the time of the judgment given, is also to be delivered, until out of the rents, issues, and profits thereof, the debt and damages are levied, or till the defendant's term therein be expired, as if he be

only tenant for life, or in tail.

The fieri facias, which is an old common law process of execution, is also a writ directed to the sheriff commanding him, that he cause to be made of the goods and chattels of the defendant, the debt or damages recovered, and give the amount thereof to the plaintiff. This writ, and another writ called a levari facias, which commanded the theriff to levy or make of the lands (i. e. of the iffues, rents, and profits thereof) and chattels of the defendant, the fum recovered, were the only common law process of execution. But when the flat. Westm. 2. gave the elegit, the levari facias fell into difuse, and is now seldom sued out, unless against ecclesiastics, after return made by the theriff, that the defendant is clericus beneficiatus, nullum babans laicum feedum; and then it is directed to the ordinary or bishop, who thereupon fends forth a fequestration of the profits of the clerk's benefice, directed to the churchwardens, &c. to gather up the same, and pay them over to him that had the judgment, till the debt is paid. But this writ of fequestration must be renewed every term; and the bishop

These writs specify the nature of the action, and the judgment recovered; and differ in the return of them, as the action was by bill or original. For all of which forms, see the Books of Entries. The forms of them are printed with blanks, and ca. fa.'s and fi. fa.'s may be had at the stationers, neither of which need be signed, but they must be sealed, for which 7 d. is paid. Elegits are sued out of the office, and are both signed and sealed, for which 1 s. 8 d. for signing.

and 7 d. for fealing is paid.

If the party sues out a ca. sa. at first, and the defendant is apprehended and held in execution, no other process can be sued out against him. But as the desendant might, by this process, undergo a perpetual imprisonment for life, the legislature has humanely provided by the Stat. 32 G. 2. c. 28. that if a desendant charged in execution, for any debt less than 100 l. will surrender all his effects to his creditors, (except his apparel, bedding, and tools of his trade, not in the whole amounting to the value of 10 l.) and will make oath of his punctual compliance with the statute, the prisoner may be discharged, unless the creditor infilts upon detaining

detaining him, in which case, he shall allow him 2 s. 4 d. per week; to be paid on the first day of every week; and, on failure of such regular payment, the prisoner shall be discharged. Yet the creditor may, at any suture time, have execution against the lands and goods of the desendant, though never more against his person.

A capias ad fatisfaciendum lies not against peers of the realm or their wives, except upon a statute staple, or statute merchant, upon the statute of Acton Burnell. 11 Ed. 1. and

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Nor does a capias ad fatisfaciendum lie against executors or administrators, for the debt of the testator or intestate, except a devastavit is returned, and then a ca. fa. lies against their bodies, or a fa. fa. against their goods.

If upon an elegit sued out, the party had no lands to be delivered, and the goods and chattels levied thereby are not sufficient to pay the debt, &c. a ca. sa. may then be had

after the elegit.

So after a fi. fa. sued out and executed, if all the goods and chattels are not sufficient to satisfy the judgment recovered, a ca. sa. may then be sued out. So that the body and goods may be taken in execution, or lands and goods, but not body and land too, upon any judgment between subject and subject, by the course of the common law.

An elegit lies against peers of the realm as well as others. And also against executors and administrators, upon a de-

vastavit returned.

Upon an elegit, the sheriff must take an inquisition, by twelve men, and the lands must be described with certainty, and the moiety set out by metes and bounds, and no more than the moiety delivered. But if the goods and chattels are sufficient, he ought not to take an inquisition of the lands.

A fieri facias lies as well against peers as others; and against executors and administrators, with regard to the goods

of the deceased.

award elegits upon the roll, which he may do into as many counties as he pleases; and then he has no occasion to sue out testatum elegits, if the desendant has no lands or affets in that county where the elegit was awarded. But it is said, that if a party awards an elegit into one county, extends the lands upon the writ, and asterwards files it, he is barred, and cannot sue out an elegit into any other county.

Of execution in ejectment, &c. see under titles Ejectment, &c. in the fecond volume.

detaining him, in When to be fued out, and by whom.

Xecution may be fued out immediately after judgment figned, and before it is entered. An. Prat. 256. Law

of Executions 43.

If execution is not fued out within a year after the judgment, the judgment must be revived by feire facios, and judgment thereon must be obtained, before execution can be fued out. Att. Pract. 374. Sed vide poft, in what cafes it may be sued out without a sci. fa. and and a soob 1014

Note, The year is to be computed from the day of fign-

ing the judgment. Barnes 197. . Dentitier at the thouse a

If either party die, before execution fued out, it cannot be fued out, till feire facias fued out by or against the representative of the party, and judgment thereon. Att. Prac. 374. King's Rep. 10. to pay the

If error be brought, and the judgment is affirmed, the plaintiff may take out execution without a fcire facias, though the year and day are past fince the judgment. Law

ed; a ca. fa may then be far

An elegit lies against p

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of Ex. 45. Att. Prac. 71.

If a judgment is affirmed on error in Cam. Scace, and afe terwards another writ of error is brought on the award of execution, this is no supersedeas to the execution. Salk.

In trespals against four-defendants brought error in Cam. Scace, and then the writ abated by the death of one. And other writ was brought, and that abated by the death of another: and no new writ being brought, the plaintiff fued out a ca. fa. without reviving the judgment by feire facials, which the court held to be good, as there was no need to revive the judgment, as that was sufficiently revived by the writs of error. But they held, that where a writ of error determines by abatement or discontinuance, the judgment is not again in B. R. till there be a remittitur entered; for, without such remittitur, it cannot appear to the court of B. R. but that the writ of error is still depending in Cam. Scace. and for want of this, the execution was erroneous, but not void. Salk. 261. 18 desired and as solution

If the defendant dies after the writ of execution is taken out, and before it is executed, yet it may be executed on his goods in the hands of his executors or administrators. Law of Ex. 46. Att. Pract. 233. Pract. Reg. 215! chast

If the plaintiff dies after a fi. fa: fued out, yet it may be executed notwithstanding his death. Cro. El. 459. And his executor or administrator shall have the money. Ibid. And if the plaintiff has made no executor, or administration

is not yet committed, the money must be brought into court, and there deposited until, &c. Noy 73. Vide Ld.

Ray. 1073.

If an executor has sued out an elegit, upon a judgment recovered by himself, and before the debt is levied dies intestate, the administrator de bonis non shall take advantage of it. But otherwise, if he dies before execution sued out.

Trespass and judgment against four, in C. B. error in B. R. and one died, whereby the writ abated, and thereupon plaintiff took out a ca. fa. against all four. Per cur.

1. The writ of error is abated. 2. If execution had been taken against three only, it had been erroneous, because not warranted by the judgment. 3. If execution had not been so long delayed by the writ of error, so that it might have been tested, of the same term as the judgment, then the death of one had not been material, because subsequent to the teste. 4. This execution is wrong, and must be superseded, because the death of the party does not appear by matter of record to the court, and, till apprized of it, they are bound by the writ of error. 5. In this case, no need of a sci. fa. which is only necessary in cases where a new person is to be better or worse by the execution; then, there must be a sci. fa. because, being a stranger, he must be made party. - But where execution is neither to charge or benefit any new party, as in this case, where there is a furvivorship, it is not necessary; for there is no reason why death should make the condition of the survivors better than before. Salk. 319. Ld. Raym. 244.

Defendants had delayed plaintiff, by bills in Chancery for injunctions, and by obtaining time for payment, &c. and upon the plaintiff's fuing out execution above a year after judgment, without a fcire facias, the defendants moved to fet afide the fame, for irregularity. Per cur. "The rule of reviving a judgment, above a year old, by fcire facias, before fuing out execution upon it, which was intended to prevent a furprize upon the defendant, ought not to be taken advantage of by a defendant, who was fo far from being furprifed by the plaintiff's delay, that he himself has been trying all manner of methods whereby he might delay the plaintiff; and therefore, they not only discharged the rule, but with costs. 4 Burr. 660. — Though said in Barnes 132. Att. Prast. B. R. 371. that if not taken out

within

within a year, there must be a sci. fa. though the plaintiff

was stopped by injunction. So is Salk. 322.

If a writ of error abates by motion, the court must be moved for leave to take out execution; but if it abates by reason of variance from the record, so that the record is never removed, no need of motion. Salk. 264.

After a writ of error is non-proffed, the court, on motion, will give leave to take out execution, though a fecond writ of error is brought. King's Rep. 243.

A writ of error is an immediate supersedeas.

But if bail in error is required, and not put in four days after the writ of error delivered, and a supersedeas obtained thereon, the plaintiff may take out execution. Att Pract. C. P. 382.

If feveral bring error, and one dies, there can be no execution without leave on motion. Att. Pract. 429.

King's Rep. 159.

If a writ of error abates by the death of the chief justice, the plaintiff cannot take out execution without leave of the court. Prast. Reg. 195. I Barnes 139. King's Rep.

But where the writ of error not being returned and figned by the chief justice, became ineffectual by his death, the rule to shew cause, why plaintiff should not be at liberty to take out execution, was made absolute. Dyer 173. Barnes 201.

Execution cannot be taken out after error allowed, and bail; though the writ of error was spent before judgment signed. I Barnes 195. — But if final judgment be not signed till a subsequent term after error allowed, this is regular. I Barnes 132.

If the writ of error is returnable the effoign day of the term, and judgment figned the fame term, execution can-

not be sued out. 1 Barnes 134.

But if an action is brought on a judgment, pending a writ of error, and judgment obtained on that action, the plaintiff may take out execution on the fecond judgment, unless the defendant moves the court before the fecond judgment obtained. I Barnes 140, 143. Barnes 203.

In C. B. if plaintiff bring debt on judgment, he cannot take out execution on that judgment, till he has discontinued his action. 2 Barnes 169.—Though it is said in Att.

Pract. B. R. 254, 5. that in B. R. he may. Sed q.

After

After execution executed, the court cannot enquire into

the quantum of debt and costs. 2 Barnes 162.

If there be a cesset executio upon the judgment for a year, the plaintiff may have execution, after a year and day, without a sci. fa. Att. Prac. 371.

If an administrator, durant. minor. ætat. recover judgment, and afterwards the executor come of age, he may have a

scire facias on this recovery. Law of Ex. 7.

If baron and feme executrix obtain judgment, and the feme dies, the baron cannot have execution, but administrator de bonis non.

So if they obtain judgment on a scire facias. Cro. Car.

464.

But where baron and feme recover land and damages, and baron dies, the feme shall have execution of damages. Law of Ex. 8.

So if baron and feme recover judgment in right of the feme, and the dies, baron shall have execution. Law of

Ex. 10.

An executor may revive judgment, but cannot take out

execution, pending a writ of error. 2 Barnes 347.

In debt, if the defendant acknowledge the action for part, and for refidue pleads to iffue, the plaintiff shall not have execution, for what is acknowledged, till the iffue is tried, unless he release the damages. If he be nontuit on the iffue, he shall have execution after for what is acknowledged. Law of Ex. 44.

If after judgment there is an agreement between the parties that execution shall not be taken out till the next term, and it is sued out before, the court will set aside the pro-

ceedings. 1 Mod. 20.

If no execution has been taken out on the judgment on a fire facias, one execution may be fued out, for debt and costs and damages in the original action, and for the costs of a non-pros of a writ of error. Att. Prast. 440.

If the desendant is taken on a ca. sa. and bail in error afterwards persected, the person shall be discharged; but in case of a si. sa. the proceedings, so far as the sheriff has

gone, must stand. 2 Barnes 175.

Upon a judgment obtained, and all parties living, if a fi. fa. ca. fa. or elegit be fued out within the year, and returned and entered upon the roll, the same may be continued down from term to term, to the time of the execution

thereof, although after the year, and shall be as good as if

the judgment had been revived by scire facias.

Within a year after judgment, plaintiff sued out a fi. fa. in Easter term, 1757. returnable Cras Ascens. in the same term; and continued it upon the roll till Trinity, 1758, by vicecomes non missit breve; and defendant being taken in the same term by a ca. sa. issued on the judgment, it was moved, that this was irregular, there neither being any scire sacias to revive the judgment, it being above a year old, nor any execution returned by the sheriff to warrant the entry of the continuances on the roll. Per cur. C. B. The defendant must be discharged, and plaintiff pay the costs of the application, as it is irregular to continue the execution on the roll which was never returned or filed. 2 Wilf. 82.

Defendant was taken on a ca. fa. and discharged by plaintiff's consent; and above a year after the plaintiff sued out another ca. fa. without continuance upon the roll; and it was set aside notwithstanding a written agreement. 2

Barnes 165.

Several years after judgment an award of execution was entered, as of the same term with the judgment, and continued down and executed without a scire facias, and held well. Att. Pract. 248, 372. Carth. 283.

In C. B. it feems necessary that a writ should be actually sued out, pursuant to the first award. Vide 2 Barnes 172.

But where on a rule to shew cause, why a fi. fa. should not be set aside, the judgment being above a year old, and not revived by scire facias, nor any continuances of a fi. fa. entered on record: the plaintiff having, before cause shewn, entered the continuances, and producing intervening writs of fi. fa. to warrant the same, the rule was discharged.

Rich. Att. Pract. C. B. 234.

On an old judgment not revived by feire facias—Plaintiff took out a ta. fa. and on defendant's application to the court to fet it aside as irregular—the plaintiff produced a roll whereon continuances were entered of a fi. fa. sued within the year, with a vicecomes non misst breve, and an award of a ca. fa.; but it not appearing, that the first fi. fa. or any other was returned, the continuances were deemed insufficient to support the ca. fa. on an old judgment not revived—and defendant was discharged with costs. Barnes 213.

A feire facias to revive a judgment, or award of execution, must be in that county where judgment is recovered, Vol. I.

or execution awarded; and an execution was fet afide because the scire facias was in a wrong county. Barnes 207.

A man may award, on the roll, elegits into as many counties as he pleases, and execute all or any at his leisure; but it is faid, that if he awards an elegit into one county, extends the lands upon the writ, and afterwards files it, he is barred, and cannot fue out an elegit into any other county.

Where, by inquisition on an elegit, it is found, that the plaintiff was feifed of the lands at the time the judgment was given, upon an ejectment [which must be] brought to recover the possession; the plaintiff need only give in evidence the copy of the judgment, elegit, and inquisition, thereupon filed; and is not bound to prove the party feized at the time of the judgment; and, if he was not feized, it must be proved by the other side.

If a defendant furrenders himself, after judgment, in discharge of his bail, the plaintiff must charge him in execution in two terms following, (the term in which he furrenders being one) or he shall be discharged on common bail, as if in custody for want of bail upon an action, unless pro-

ceedings be stayed by writ of error, or injunction.

Defendant obtained a supersedeas, for want of a declaration in an action of debt on judgment, and was afterwards taken in execution by a capias ad satisfac. issued after a year and day from the time of the judgment, without any fire facias to revive. Defendant brought his action for false imprisonment, and plaintiff justified under the ca. sa. Defendant now applied to fet aside the ca. fa. and it appearing that a capias ad respondendum only, and not a ca. sa. had iffued within the year, there was nothing to warrant the continuance of a ca. fa. on the roll; and the rule was made absolute to set aside the ca. sq. Martin v. Ridge, Barnes 206.

After error allowed, plaintiff brought an action on the judgment, and bail justified. Afterwards the writ of error was non-proffed for want of transcribing the record. Plaintiff, without discontinuing his action on the judgment, took defendant's goods in execution by testatum fi. fa. which was held irregular; and the writ fet afide, and restitution awarded, with costs. Plaintiff will be at liberty to take out execution, after discontinuing his action on the judg-

ment. Barnes 208.

Where the Execution must be joint, and where it may be several.

IF judgment be against several, execution must be joint. 3 Keb. 298. Att. Pract. 254. Law of Ex. 7. 62. 2 Barnes 172.

But though a scire facias against bail be joint, yet execution may be several. 1 Lev. 225. Law of Ex. 63.

In popular actions there shall be but one execution for

king and party. Law of Ex. 63.

If two be bound jointly and feverally to A. and A. fue them jointly, A. may have a capias against them both, and the death or escape of one shall not discharge the other; but A. cannot have a capias against one, and another kind of execution against the other; because, though they be two several persons, yet they make but one debtor, when A. sues them jointly: but if A. sue them severally, he may sever them in their kinds of execution; though if once a very satisfaction be had of one, or against the sheriff for an escape of one, the rest may be relieved by an audita querela. Hob. 59.

Verdict against four defendants, judgment by default against the fifth, error brought in the name of the fifth only, and on motion, the court gave leave to take out execution against the other four. 1 Barnes 141. Pract. Reg. 194.

Judgment against two; one dies, the plaintist brings a fci. sa against the survivor, and the executor of the other defendant; the survivor makes default, and the executor demurs and had judgment, because the court held that the personal lien survived. Per Holt. Where a judgment is against several, there the lien survives; for as the land is not bound but in respect of the person, so in that case the party dying, his lands are unbound. If judgment be against two or three, the execution must be joint, and not against any one; and if three be jointly and severally bound, the party must sure either all or one, and cannot sue two, because neither joint nor several: but where several become bail, the one may be sudd without naming the other, for they are severally bound. Cary v. Ward. Pas. 26. Car. 2. 3 Keb. 298.

If baron and feme are taken in execution, the feme shall

not be discharged. I Barnes 142.

But if the feme only is taken, she shall be discharged. 2

Barnes 161. Pract. Reg. 208. 9.

But if baron and feme are taken in execution, and the baron escape, unless the plaintiff will retake the baron, the seme shall be discharged. I Vent. 51. Att. Prast. B. R. 255.

Where the Execution must be joint, and where it may be several.

In trover, if there is judgment and execution against baron and feme, the court will not discharge the seme, unless there is fraud or collusion between plaintiff and the husband

to keep her in custody. Stra. 1167.

So in battery by defendant's wife of plaintiff's wife, the court will not discharge the wife who is only in execution, if it appears there is no design to screen the husband. Stra. 1237. Wil. 149. Though said in Cro. Car. 513. that if judgment be recovered against baron and feme for the contract, nay even for the personal misbehaviour of the seme during her coverture, a capias shall issue against baron only.

If judgment is recovered against baron and feme for the debt of feme dum sola, a capias may issue to take both baron and

feme in execution. Moor 704. Barnes 203.

But if an action is brought originally against feme dum fola, and pending the suit she marries, a capias. shall be awarded against her only, and not against baron. Cro. Jac.

Action against baron and feme for debt contracted by her dum fola; after judgment against them, the bail rendered them both to prison in discharge of bail, and on motion she

was discharged. 3 Wilf. 124.

But where judgment and execution are against husband and wise, she shall not be discharged, but only where she is in custody upon mesne process; and when husband and wise are rendered in discharge of bail after judgment against them, they are in the same situation as if bail had never been put in, and not being charged in execution, the wise must be discharged out of prison. Ibid.

Action by baron and feme who were nonsuited, and feme alone was taken on a capias for the costs, and she was dis-

charged. Barnes 207.

After judgment in a joint action, plaintiff sued a out fi. fa. against one only. He moved to set aside the fi. fa. and to have restitution: on which plaintiff prayed to amend the fi. fa. by the judgment, and quoted Browne v. Hammond, East. 12 Geo. 2. The parties came to an agreement asterwards, without any determination. Barnes 210.

Where Execution may go.

If you want to have execution into a different county from that in which your venue is laid, it must be by a testatum writ, whether a ca. sa. or si. fa. having first got an original si. fa. or ca. sa. into that county where the venue is laid returned to ground the testatum on. Att. Prast. C. B. 234. The same in B. R.

But the courts will not go into a nice enquiry when the fi. fa. or ca. sa into the original county was sued out, but it is sufficient to produce the writ returned. 2 Barnes 169. and it need not be filed before the testatum issues. 1 Barnes

1 28.

Ca. fa. into Wiltsbire, and then a testatum into London, but the testatum part of the writ omitted and held bad, and the desendant discharged: and Lord Manssield said it appeared clearly from Prast. Reg. and Barnes, to be necessary that it should appear to be a testatum, for it did appear so there on the record, and the court held, that it so appearing, the writ was good without repeating it. East. 10 Geo. 2.

It is not necessary to insert the form of a testatum in a testatum writ, so as that it may appear from the writ itself to be a testatum. 2 Vol. Rules and Orders B. R. and C. B. 79. Prast. Reg. 210. 212. Barnes 129. 132. But there must

be an award of a testatum upon the roll.

Judgment in B. R. a fi. fa. into London returned nulla bona, and a testatum into Montgomerysbire, to which the sheriff returned that the writ of our lord the king does not run into Wales, but at the king's suit, or where he is concerned. Per cur. On a judgment in this court, execution may be awarded into Wales or a county palatine. Vide Cro. Jac. 484. Cro. El. 445.

That lands in Wales are pleadable here. Hetley 18. 20.

21. 2 Bulf. 54. 156.

2. If the writ did not run there, yet the sheriff, being an officer of the court, ought not to question it, but to make return of the execution of it; and the sheriff was ordered, upon a penalty, to return the writ as he would stand by it: for sheriffs in Wales ought to execute judicial writs, and the court has none to write to there, as in counties palatine, where they write to the chancellor or chamberlain, or warden of the Cinque Ports. An elegit may be executed in Wales, and why not a fi. fa.? If it could not, the party would be without remedy; for he cannot bring an action there upon this judgment; and he cannot outlaw the defendant,

Where Execution may go.

because this is on a bill of debt against an executor. Draper v. Blainey. Tr. 22 Car. 2. 1 Lev. 291. Ray. 206. 2

Saund, 193. 2 Keb. 649, 657, 724.

Motion to have restitution of goods levied by a fi. fa. out of B. R. in the county palatine of Chester, denied. Per cur. Executions may well issue out of this court, to the county palatine, on a judgment originally given here. I Lev. 256.

Motion to fet aside execution, on a judgment in G. B. on which judgment an action of debt was brought in the mayor's court of Worcester, and defendant was arrested there; and afterwards plaintiff took out execution in this court. Rule to shew cause why plaintiff should not make

his election. Richard v. Davis. Barnes 203.

Judgment in Middlesex: Defendant taken on a testat. ea. sa. in Somersetsbire, out of Middlesex. Objection, That no ca. sa. in Middlesex to warrant the testatum, as appeared by searching: but after the search, a ca. sa. in Middlesex was returned, and entered in the sherist's book. The court held, that had the application been recent, they must have taken notice of it: But as defendant had long acquiesced, and as possibly an action for an escape might have been brought against the sherist of Somersetsbire, the rule to shew cause, why the testatum ca. sa. should not be set aside, was discharged. Barnes 200, 211.

Rule to shew cause why si. fa. should not be set aside, the judgment being above a year old, and not revived by sci. fa. nor any continuance of si. fa. entered on record. Plaintiss, before cause therein, entered the continuance, and produced intervening writs of si. fa. to warrant the same; whereupon the rule was discharged. Elegit may be continued before suing out the writ; but si. fa. or ca. sa. cannot be continued, without suing out the writ. Law v.

Beart. Barnes 210.

To warrant such continuances, the sirst writ must appear to have been returned, otherwise they will be insufficient. Blayer v. Baldwin. Barnes 213.

S Eizing part of the goods in a house on a fi. fa. in the name of the whole, is good. Ld. Ray. 725.

Seizing goods on a fi. fa. will not discharge a co-obligor, unless they are sold, and the plaintiff satisfied. Ld. Ray. 1072.

By feizing goods on a fi. fa. the debt is discharged, and

payment to the sheriff is good. Ibid.

The sheriff that began execution shall end it, though he is out of his office. Salk. 323. And may sell goods after he is out of his office, without a venditioni exponas. Ld. Ray. 1073.

If a fi. fa. out of the Common Pleas is executed before error brought, the Common pleas shall award the venditioni

exponas. Ld. Ray. 990.

A fi. fa. cannot be executed after the defendant becomes

a bankrupt. Ld. Ray. 252.

A fi. fa. bearing teste before the desendant's death, may be executed upon the goods in the hands of the executors. Ld. Ray. 850.

A fi. fa. may be executed after the death of the plaintiff,

if tested before. Ld. Ray. 1073. Salk. 322.

On a fi. fa. the sheriff cannot deliver the goods to the plaintiff, but on an elegit he may. Ld. Ray. 346.

Execution on a fi. fa. in the life of the testator, gives a

right to executors. Salk. 12.

A feizure of goods, by the sheriff in execution, divests the defendant's property, and discharges his person. Salk.

A writ of error is a supersedeas to an execution [not begun to be executed] as soon as allowed, and without no-

tice. Salk. 321.

At common law, the goods were bound from the teste of the writ: By the statute of frauds, they are bound only from the delivery of the writ to the sherisf. And, per Hardwicke C. neither before nor since the statute of frauds, is the property altered, but continues in defendant till execution executed. The meaning of the words in the statute is, that after the writ is so delivered, if the defendant make an assignment of his goods, unless in market overt, the sherisf may take them in execution. Lowtal v. Tomkin's. Eq. Cas. Abr. 381.

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A fi. fa. being executed fraudulently, a fi. fa. at the suit of another afterwards shall stand good, and be preferred.

1 Wilf. 44.

If two writs of fi. fa. be delivered to the sheriff the same day, he must execute the former first, or an action will lie against him, unless the plaintiff, who delivered the first writ, shall refuse to take out a warrant thereon. Ld. Ray.

252. Carth. 419.

If the sheriff sells goods under a fi. fa. that was last delivered, the property is bound, and he cannot afterwards seize them under the former writ. Ld. Ray. 252. Salk. 320. But in such case, the party who delivered the first fi. fa. has his remedy by action against the sheriff. Ibid.

The sheriff is bound to answer the returned value of the goods, though they are afterwards rescued. Ld. Raym.

1075

On a judgment on a bond, the plaintiff may levy interest and costs, to the time execution is compleated. 2 Vol. Rules and Orders K. B. And Cases of Prast. C. B.

If judgment be for the penalty of a bond, the plaintiff may levy poundage, and other charges out of the penalty.

Att. Prac. 234. 1 Barnes 134. Pract. Reg. 213.

It hath been held in C. B. that after execution executed, though the judgment be for a penalty, the court cannot refer it to the prothonotary to enquire what is due for principal, interest, and costs, and what is levied, in order to make restitution of the surplus, without consent of the plaintist; but the desendant must apply for relief to a court of equity. 2 Barnes 162.

Debt on bond against the principal, and after against the bail, and the whole penalty levied of the goods of the bail, and the money remaining in the sherist's hands, they move that the plaintiff may accept his principal, interest, and charges, and return the rest. The court of B. R. said, that the desendants came very late, for they never used to make such a rule after execution executed; yet, being in the case of the bail, and the money remaining in the sherist's hands, it was granted. But if the sherist had paid the money over to the plaintist, they would not help the desendant. Anon. Mich. 30 Car. 2.

No notice need be given of executing a writ of elegit, as there must of a writ of enquiry of damages. Tr. 30 Car. 2.

If a warrant on a fi. fa. be altered, after it is sealed, the

execution thereon is void. Pract. Reg. 219.

There were two joint partners in trade; judgment was obtained, and entered against one; and, on a fi. fa. all the goods being undivided, were seized in execution. Per cur. The sheriff can sell no more than the moiety, for the property of the other moiety was not affected by the judgment, nor can it be taken in execution. Ld. Ray. 871.

If, upon an elegit, the sheriff deliver the moiety of a house, without metes and bounds, the return is ill, and shall be quashed for incertainty; but if the sheriff, upon an elegit, deliver more than a moiety, the return is not void; but voidable by writ of error, or audita querela. Carth. 453.

If the sheriff, upon an inquisition upon an elegit, returns the desendant to have twenty acres in Dale, and twenty acres in Sale, and delivers the twenty acres in Sale for the moiety of the whole, all is void; for he ought to deliver a moiety of twenty acres in each vill; and this might be avoided in evidence, in ejectment brought for the lands. I Lev. 160.

After the writ of elegit returned and entered upon the roll, tho' the return is wrong, it cannot be quashed or discharged, but by writ of error. Sed quere, and vide Keb. 313.

In case of execution by elegit, ejectment must be brought

to gain possession.

If A. is taken in execution, and then plaintiff lets him at large, he cannot afterwards bring debt on the judgment.

Defendant arrested by a ca. sa. paid the money to the sheriff's officers; before the return, defendant delivered to the sheriff a si. sa. against the plaintist, upon which the sheriff levied the sum therein expressed out of the money in his hands by the ca. sa. and upon being called upon to return the ca. sa. made the return thereof to the above effect, which the court held insufficient, and ordered the sheriff to pay the money paid to him upon the ca. sa. to the plaintist, deducting his poundage. Barnes 214.

Defendant became a bankrupt, and after his certificate allowed, his goods were taken in execution. Defendant obtained a rule to shew cause on stat. 5 Geo. 2. why the fi. fa. should not be set aside, and restitution.—Per cur. We are not required by the statute to proceed in a summary way, as to the goods of a bankrupt, though as to his person we are; if the desendant did not obtain his certificate in time,

so as to plead it, he may bring an audita querela. Rule dif-

charged. Calcraft v. Swann, Barnes 204, 206.

If a fi. fa. be sued out in the life-time of the defendant, who dies before the return of the writ, yet the goods may be taken in execution upon this writ, be there executor or administrator, or neither, for the goods were bound by the execution. Roll. 393. Cro. Car. 174, 181. Cowper v. Dawes, Hil. 20, 21 C. 2. C. B. Sed vide Stirt v. Alder, Tr. 22 Car. 2.

D. administratrix of J. S. recovered a judgment in C. B. of 340 l. against C. and sued out a fi. fa. to the sheriff of Middlesex, who returned, that he had seized goods to the value, but that they remained for want of buyers. Afterwards, and before the goods were sold, D. died, on which C. sued out a sci. fa. to the sheriff, to shew cause why the goods should not be restored, supposing that, as D. was dead, there was no body to have the fruits of the execution. Upon demurrer to the writ, judgment was given for defendant, which judgment was affirmed afterwards in error in B. R.—C. being, by the seizing of the goods in execution, discharged of the judgment. Vide the case at large. Clerk v. Withers, Ld. Raym. 1072. and cases of executions there cited. The sheriff, in such case, is responsible to the representative of the plaintisf.

But in case of an extent, and inquisition had, the execution is not complete till a liberate is awarded; and if the plaintiff to the execution die before the awarding of the liberate, the writ of extendi facias is abated by his death; and his representative cannot have fruit thereon; because no right was vested by the extent. Vide the case of Cleeve v. Veere, Cro. El. 450, 457. I Jones 385. and the cases cited

in the foregoing cafe.

How supersedeable.

A Writ of error is a fupersedeas to an execution [not begun to be executed] as soon as allowed, and without notice in B. R. Salk. 321.

But if execution be executed, before a writ of error allowed, or notice, it may be returned afterwards. Ibid.

But in C. B. a writ of error is no fuperfedeas from the fealing, but from the delivery to the clerk of the errors. Barnes 205, 209.

Execution after error allowed, and bail thereon, held irregular, though the writ of error was spent before judgment signed. Barnes 260.

Though a writ of error is an immediate supersedeas, yet if bail in error is required, and not put in in four days after the writ of error delivered, and a supersedeas obtained thereon, the plaintiff may take out execution. Att. Prast. C. P.

If the sheriff returns a fi. feci et non inveni emptores, before the writ of error, the execution is not to be undone.

1 Vent. 255.

A writ of error is a *fuperfedeas* from the time of the allowance, and that is notice of itself. Say. Rep. 51, 52.— Burr. Rep. 4 pt. 340.

But if the defendant have notice before the allowance, it is from the time of that notice a fupersedeas. But though the allowance is notice of itself quead to supersede the execution, yet, to bring the attorney into contempt, he must have had actual notice. Burr. Rep. 4 pt. 340.

A writ of error returnable the effoign day of term. Judgment signed the same term, execution cannot be sued out. Barnes 198.

If a writ of error be not returnable before the death of the chief justice it is lost; but execution may not be taken out without leave of the court. Barnes 201.

In Mich. 1778. interlocutory judgment was figned, and, to fave the expence of executing a writ of enquiry, the defendant confessed judgment to 42 l. with liberty to fign the judgment the last day of the then Mich. term.—On 30th of Nov. the plaintiff gave notice of taxing costs, in consequence of which the defendant's agent got a writ of error returnable the 1 Feb. which was allowed the 28th, and service thereof on plaintist's agent was given the 30th of Nov.—On 1 Feb. plaintist's agent ferved a rule to certify the record in error; and the defendant's agent paid eleven shillings in part of the transcript money.—On the last day

How supersedeable.

of Hil. term, viz. 12 Feb. the defendant died, after which the plaintiff's agent finding final judgment not figned, on the 25th Feb. 1779, figned the judgment by confession, as of Hil. term, and on the 26th issued execution for damages and costs, tested on the last day of Hil. term, which was in the defendant's life time. - On which execution the damages were levied and paid to the plaintiff's attorney to abide the determination of the court on the regularity of the execution. In Mich. 1779, on the argument of the cafe, on motion to fet aside the execution, the court were unanimous, that the execution was irregular, -But Buller, just. seemed to say, that notwithstanding the writ of error did not abate till the defendant's death, yet that on an affidavit of the death, by which fuch abatement would have appeared, the court would, on motion, have given leave to take out execution; and that this execution, for want of fuch motion, could not be supported. Beard and others executors v. Kenyon. B. R. Mich. 1779.

See more under title, "when to be fued out, and by whom, &c." ante-Alfo under title Error in the fecond

volume.

Execution was taken out after error allowed, and bail put in. And the question was, Whether such execution was regular-For plaintiff, the writ of error being returnable tres Trin. was spent before final judgment signed, which was not till 30th of June, after the end of Trinity; and that therefore the execution was regular. - For defendant it was urged, that by the writ of error the record was transcribed into B. R. that the writ was not spent; that the final judgment figned in Trinity vacation relates to the first day of Trin. term; and that therefore the writ of error is a supersedeas to it; and the execution in question bears teste the last day of the term. If plaintiff had staid till Mich. term, before he had signed final judgment, as in Joy v. Fanshaw, he might have had some colour to take out execution, (though that is a practice not to be encouraged). The court were of that opinion, and ordered the execution to be set aside, and restitution and costs. Warwick v. Figg, Barnes 196.

Motion to fet aside execution issued after error allowed, and notice thereof given. It appeared interlocutory judgment was signed, and a writ of enquiry executed in Mich. term; and the writ of error was then allowed, and notice given; but the final judgment was not signed till after the

beginning

How supersedeable.

beginning of Hilary term after. The court held the execution regular; the interloc. judgment not being removeable by the writ of error, and the final judgment being figned of a subsequent term, was not removed. No rule. Cooke

v. Horrock, Barnes 197.

Error brought, and the writ of error returnable essign day of Hilary. Final judgment signed the same term, and the plaintiff took out execution, apprehending the judgment not removed by the writ. On which defendant moved to set the execution aside, insisting, that the judgment relates to the essoign day; and the court will not make a fraction of a day, so, consequently, the record was removed by the writ.—Plaintiff insisted, that the judgment must be given before the return of the writ of error; and, if given on the return day of the writ of error, it cannot be removed by that writ. The court held the record well removed, and set aside the execution with costs, no action to be brought. Barnes 198.

Of the Teste and Return of the Writ.

I F the proceedings are by bill, execution must be made out returnable on a day certain; if by original, on a ge-

neral return day in term. Att. Pract. 66.

A writ of execution need not be made returnable the term after it issues; but there may be an intervening term between the teste and return. Salk 700. 2 Ld. Raym. 775.—
Whereas, in case of writs of messe process, if a term be omitted between the teste and return, the case is altogether out of court; but that is to be understood in personal actions. 2 Ld. Ray. 775.

If a ca. fa. is returnable, pending a writ of error, it is no regular foundation for proceeding against the bail. I

Barnes 85.

A writ bearing teste out of term is void, but the sheriff is

justifiable. Salk. 700.

There must be eight days between the teste and return of a ca. sa. to charge the bail, if proceedings are by bill. Salk. 602. Att. Pract. 344.

But if proceedings are by original, there must be fifteen

days.

In B. R. though a judicial writ must be returnable on a day certain, when the proceedings are by bill, yet any description of that day is sufficient. Law of Ex. 75.

But in C. B. where the returns of originals are settled by act of parliament, the description must be proper. Ibid.

By 13 Car. 2. flat. 2. c. 2, f. 6. to remedy the delay of fuits, by reason of fifteen days between the teste and return of writs in personal actions, it is enacted, "That in all actions of debt, and all other personal actions whatsoever; and also in all actions of ejectione firmæ, depending by original writ, after any issue therein joined to be tried by a jury; or also after any judgment had or obtained in any such action as aforesaid, there shall not need to be fifteen days between the teste day and the day of the return of any writ or writs of venire facias, habeas corpora juratorum, or distringuis juratores, writ of serie facias, or writs of capias ad satisfaciendum; and that the want of sisteen days between the teste day and the day of the return of any such writ, shall not be, or adjudged to be, any matter or cause of error, any law, &c. to the contrary."

A ca. fa. made returnable at a day which falls out of term, would not be void, though liable to be fet aside on motion; nor can such a defect in it be taken advantage of

Of the Teste and Return of the Writ.

by bail upon a general demurrer to a scire facias brought

against them. Burr. 4 pt. 1187.

In all continued writs of execution, the alias must be tested the day the former writ was returnable. Salk. 699. Vide 2 Jones 200. Att. Pract. 277. 2 New Abr. 349. But otherwise in cases of mesne process, for there they must be tested on the quarto die post.

A ca. fa. was tested before the cause was tried, and held

good. Anon. B. R.

A fi. fa. quashed, on motion, because returnable on a general return, instead of a day certain, according to the original action. Barnes 213.

What Writs of Execution must, or need not be returned.

WRITS of execution, which are to be executed by the sole authority of the sheriff, need no return to them; because thereby the plaintiff has the effect of his suit: yet, if a party apprehends himself injured by an erroneous execution, he may apply to the sheriff to return it; and, if he refuses, an action on the case lies against him. Keb.

A capias ad satisfaciendum, habere facias seisinam, or possessionem, sieri facias, liberate, &c. are good, when duly executed, though not returned. 5 Co. 90. 4 Co. 67. 2 New

Abr. 348. Law of Ex. 202, 3.

But an elegit muft be returned. Ibid.

So the capias si laicus, extent and liberate, must all be returned before the tenant by statute merchant can bring an

ejectment. Law of ni. pri. 104.

But the conuse may enter after the extent returned, before the liberate executed. 1 Ro. Abr. 737. 2 Infl. 678. And if he have once entered, quære, If he may not bring an ejectment without shewing the liberate returned.

Per cur. If it be returned to an elegit, that there are no lands, the sheriff need not return an inquisition; for the use of that is, only to deliver a moiety of the lands by, if there

are any. Stonehouse v. Ewen, Stra. 874.

Where there may be a fecond Execution.

I F plaintiff takes out a ca. fa. or a fi. fa. he may have one of them after another, or an elegit after both, if they fail. Hob. 57.

If only part be levied on a fi. fa. the plaintiff may

have a capias, or elegit, for the rest. Hob. 58.

Plaintiff took out a fi. fa. within the year, and nulla bona returned; this was continued down for several years, and then the plaintiff took out a ca. sa. without a previous scire facias, and held well enough. Aires v. Hardress, Stra. 100.

Part was levied by a fi. fa. within the year, and after the year expired the plaintiff revived his judgment by faire facias, and took out a ca. fa. and held well, though he might have continued the fi. fa. down to the second execution, without any scire facias. Pract. Reg. 209.

The plaintiff may have a fecond capias after an escape.

Law of Ex. 116.

Judgment in Middlesex. Fi. sa. there and nulla bona; thereupon a si. sa. into London was issued, but was not made a testatum si. sa. And the court being moved to set it aside, because not a testatum, resused so to do, being of opinion, that the award of the testatum si. sa. upon the roll was sufficient to warrant a si. sa. into London; and that it need not be made a testatum. Barnes 196.

If defendant be taken on a ca. fa. and escape, and no return is made of the writ, nor is it filed, nor any record-made of the award of the capias, the plaintiff may have a scire facias, and afterwards an elegit, or any other writ.

Law of Ex. 117.

A moiety of the damages was levied on one of the bail; and the other bail not having sufficient to satisfy the remainder, the plaintiff resorted back again to the first bail, and took out a second execution for the residue against the goods of the first bail. And this was held bad. The plaintiff cannot levy by parcels without defendant's request and consent; he might have levied the whole on the desendant at first. The second fi. fa. was set aside, and restitution awarded. Barnes 202. But quære, if in this case the first fi. fa. was not made out for a moiety only. It don't appear otherwise in the report.

If on an elegit only goods are levied, and those not sufficient to satisfy the whole debt, and nihil be returned as to the lands, there may be a ca. sa. after an elegit. Keb. 58. Hob. 57. Ld. Ray. 1451. Stra. 226. for in such case the elegit is but in the nature of a common fi. fa. The election

Vol. I. A a

Where there may be a fecond Execution.

is not compleat unless the plaintiff has some benefit from the land, for the taking out the writ is not an actual election, and if there be no lands, there is nothing to chuse, and confequently no election.

And if it be returned to an elegit that there are no lands,

the sheriff need not return an inquisition. Stra. 874.

But whilst defendant continues in execution on a ca. sa. there can be no other execution against him. Keb. 59. except in case of a statute, &c. where body lands and goods are all liable together. Keb. 60.

But if part of the lands is extended in the name of all, and the extent is returned, and the party accepts it, he shall never have an extent for the residue in the same county.

Law of Ex. 287, &c.

But there may be several writs of elegit into several counties. Law of Ex. 208. and the plaintiff may divide his exe-

cution. Ibid. Sed quære as to that.

Plaintiff took out a fi. fa. and thereby levied part of his debt and costs, and before the return thereof sued out a testatum fi. fa. and under it levied the residue, and the court made the rule absolute to set aside the testatum fi. fa. for restitution and costs. Barnes 213.

If defendant dies in execution upon a ca. fa. the plaintiff may have a fecond execution against his lands or goods.

Stat. 21 Fac. 1. c. 24.

After judgment in an action of debt on a former judgment, and ca. fa. delivered to the sheriff, the defendant moved to stay execution, pending a writ of error brought to reverse the former judgment. Per cur. The motion comes too late, it ought to be before judgment in the latter action.

Barnes 203.

Defendant was taken in execution, and was discharged by plaintiff's consent, and a written agreement was entered into by the parties, that the judgment (which had been revived) should stand revived for twelvemonths. After more than a year from the last ca. sa. plaintiff caused desendant to be taken in execution without continuance on the roll, relying upon the written agreement. The court held the agreement to be null and void, and made the rule absolute to set aside the last ca. sa. and discharged desendant out of custody. Thompson v. Bristowe, Barnes 205.

Of Outlawry upon Process of Execution.

WHERE the capias ad respondendum lies in process, the party may be outlawed after judgment obtained, by

capias ad fatisfaciendum.

After judgment upon a ca. fa. an exigent may be awarded without an alias and pluries, and thereupon the defendant be outlawed: because he having been already in court before judgment, and having conusance of the debt, ought to pay the debt on the first suing out of the capias, otherwise it is a contumacy in not performing the judgment of the court, for which disobedience he is put out of the king's protection. 40 Ed. 3. 25. pl. 28. Finch. 476.

So after judgment there need not be any proclamation to

the county where he resided. Cro. 7a. 577.

If one is outlawed in Middlesex, a capias utlagatum may be fued out against him in any other county without a testatum.

Vent. 33. 2 Hales Hift. 198.

If a ca. sa. issues upon a judgment in an action of debt, and the sheriff returns non est inventus, and after a capias utlagatum issues, upon which he is taken and imprisoned, and then let to go at large, the party that recovered may have debt * against the sheriff for the escape, because of the prejudice to him, he being in execution, as well for his benefit as for the king's. I Ro. Ab. 810. b. Cro. El. 706.

If within a year a ca. fa. issues on a judgment, and the defendant is thereupon outlawed, and two years after taken upon a capias utlagatum, and the sheriff suffers him to escape, debt lies against him: for the defendant was in execution at the suit of the plaintiff without prayer, inasmuch as the plaintiff was at the end of his process, and no continuance nor scire facias lay after the capias utlagatum, which being sued at the charge of the plaintiff imported an election. Salk. 318.

But as forfeiture upon outlawry in a personal action is to the king, and the plaintiff in proceeding to outlaw the defendant, after judgment, cannot be so much benefited, as by suing out any other process of execution against him, a party seldom proceeds to it: but I thought it proper to

mention such a process of execution in this place.

But it is faid, that there is a difference between an outlawry on mesne process, and after judgment; that, as to the



Bridg. 67. It appears to have been an action on the case.

Of Outlawry upon Process of Execution.

first, the party hath no interest, but, that the whole benefit of the forseiture accrues to the king. Co. Lit. 288. b. Cro. El. 707.

But in 2 Lev. 50. it is held, that there is no difference

between outlawries before, and after, judgment.

Of reverfing outlawry, &c. Vide the second vol. title Outlawry.

Where there is a Lien for Rent upon Goods taken in Execution.

BY the 8 Anne, c. 14. An act for the better security of rents, &c. it is enacted, "That no goods or chattels whatfoever, lying or being in and upon any meffuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken, by virtue of any execution, on any pretence whatfoever, unless the party, at whose suit the execution is sued out, shall, before the removal of such goods from off the faid premises, by virtue of such execution or extent, pay to the landlord of the faid premises, or his bailiff, all such sum or fums of money, as are or shall be due for rent for the faid premises, at the time of taking such goods or chattels by virtue of fuch execution, provided the faid arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the faid party, at whose suit such execution is sued out, paying the faid landlord, or his bailiff, one year's rent, may proceed to execute his judgment, as he might have done before the making of this act; and the sheriff, or other officer, is hereby empowered and required to levy and pay to the plaintiff, as well the money so paid for rent, as the execution money."

Upon this statute it has been adjudged, 1. "That there must be a demand made by the landlord before removal, or an action will not lie for him. Stra. 97. Waring v.

Dewberry.

2. That the landlord is entitled to his whole rent, without deduction of poundage. Stra. 643. Gore v. Gofton.

3. That a ground landlord, where there is an execution against the under-lesse, is not within the act. Stra. 789.

Bennet's cafe.

4. That after a landlord has had one year's rent paid, and there comes in another execution, he shall not have another year's rent paid. Stra. 1024. Dodd v. Saxby.

5. That an action lies upon it, by an executor or an administrator, against a bailist or sherist, for removing the goods off the premises after notice, before the landlord was paid his year's rent. Stra. 212. Palgrave v. Wyndham.

By feet. 8. it is provided, "That this act does not extend to the crown, to let, hinder, or prejudice the crown, in levying, recovering, or seizing any debts, fines, penalties, or forseitures, &c."

Where there is a Lien for Rent upon Goods taken in Execution.

Under which proviso it has been determined, that a landlord shall not have a year's rent on a special capias utlagatum. Pract. Reg. C. B. 272. But quare as to this.

A bill of sale held to be a removal of goods, taken by a fi. fa. and a year's rent ordered to be paid the landlord out of the money levied by the sheriff. Barnes 211.

Defendant had judgment of non-suit against plaintist; and on a fi. fa. took the plaintist's corn in execution, which was unthreshed; the landlord then gave notice to the sherist's bailist, that there was 30 l. due to him for a year's rent; after this, the bailist threshed the corn, and sold it for 21 l. Per cur. The landlord is entitled to one year's rent, before goods can be sold upon costs of a non-stuit. 2 Wils. 140. Henchett v. Kimpson.

Instead of bringing an action against the sheriff, &c. when the goods are sold after notice, the best way for the landlord is to move the court, that he may have restitution to the amount of the goods which the sheriff has sold, if they amount to less than a year's rent; or, if they amount to more, to have so much as will satisfy a year's rent.

Ibid.

If a fi. fa. is delivered, and the goods appraised and fold, but the writ not returned, and an extent for the king comes out of the exchequer, such extent will over-reach the former sale. Sed vide Ld. Raym. 252. where it is said to be

a dangerous practice.

Motion to have rent paid to the landlord out of the money levied. On shewing cause, it appeared, that the sheriff's warrant on the execution, after it was sealed, had been altered, and a new bailiff's name inserted. Per cur. The warrant being altered, no goods are taken in execution thereby. Let the bailiff and attorney, privy to the alteration, shew cause why an attachment should not issue against them. Barnes 199.

Question was, if the landlord's rent should be paid, the defendant being a bankrupt? Thereupon another question arose, whether or no, if the defendant was a bankrupt before the levy, the goods were liable to the payment of the rent? The court directed an issue, to try whether bank-

rupt or not at the time of the levy. Barnes 200.

Of charging Execution.

In B. R.

In C. B.

IN order to charge the defendant, the plaintiff's attorney procures a rule from the clerk of the rules [paying 4s.6d.] for the marshal to certify that the defendant is in his custody. On service of which rule, the marshal will write his acknowledgment, for which he is paid 10s.6d. After which, the plaintiff's attorney enters a committitur in the marshall's book, kept in the King's Bench office, to this effect:

Middlesex, sf. C. D. is committed to the custody of the marshal of the marshalsea, at the suit of A. B. for 100 l. damages, [or debt as the case is] in a plea of trespass on the case, there to remain until, &c.

O. P. attorney.

Judgment, Easter term, 20 Geo. 3.

Pall .

For entering the committitur in the marshal's book, the officer is paid 2 s.

Then file the rule with Mr. Heberden, to whom is paid 2 s.

If the defendant be in custody of the sheriff, a ca. sa. must be made out, and a warrant thereon lodged with the gaoler. Vide title Prisoners, 2d Vol.

IN order to charge defend-ant in execution in the Fleet, the plaintiff makes out a hab. corp. ad fat. gets it figned and sealed, and backed by a judge, paying 5 s. for the writ. Signing by prothonotary, 1 s. 4 d. fealing 7 d. Backing by a judge 4s, after which he carries it to the clerk of the papers at the Fleet, four days before the return, who is paid 9s. 2d. Then the treasury keeper must be applied to, to bring in the roll, on which final judgment must be entered, to whom you pay 2 s. As judgment must be entered, the clerk of the judgment should have two or three days beforehand. On the day the defendant is brought into court, the officer is paid 10 s. 6 d. for bringing him up, 2 s. to the cryer, and to the secondary 9 s.

^{*} The committitur piece must be filed or entered on the roll before the end of the second term. To terell v. Philby. Burr. 4 pt. 1841.

Of entering Satisfaction on the Roll.

AFTER satisfaction obtained of a judgment, an entry thereof should be made of record, to the end that the plaintiff in the suit may appear to have been satisfied. Therefore the party, or his attorney, making satisfaction, should demand of the party satisfied a warrant or authority, directed to the same attorney of the court wherein the judgment is recovered, authorizing such attorney to enter up satisfaction upon the roll, which may be made out in the following form, on a slip of paper or parchment.

Trinity term, 20th Geo. 3.

Middlesex ss. Satisfaction is acknowledged between A. B. plaintiss, and C. D. desendant, in a plea of debt for 100 l. and 63s. costs.

Judgment entered of Hilary term, 20th Geo. 3. Roll 492.

I. M. Attorney for the plaintiff, 15 June, 1780.

This fatisfaction piece must be taken to the clerk of the judgments, and he will make an entry thereof in his book of remembrances, and deliver the same over to the clerk of the treasury, who will enter the same on the roll, for which is paid in term 3s. in vacation something more.

The entry is to the following effect:

"Afterwards, to wit, on [some return day in the term; if by original, on a general return day; if by bill, on a day certain.] In the twentieth year of the reign of our sovereign ford George the third, now king of Great-Britain, &c. at Westminster, cometh the aforesaid A. B. by his attorney aforesaid, [or by I. M. his attorney, in this behalf] and acknowledgeth himself to be satisfied by the said C. D. of the debt and damages, costs and charges aforesaid, &c."

TABLE

OFTHE

CONTENTS of this VOLUME.

Page

Of the Terms,	I
Df Process.	5
Of profecuting a personal Action in the Court of King's Bench by original Writ, Of profecuting a personal Action in the Common Pleas, Of the original Writ, and herein of the Teste and Return, B. R. Of the original Writ, and herein of the Teste and Return, C. B. Of the Latitat, and herein of the Teste and Return of the Writ, &c. B. R. Of the Capias, and herein of the Teste and Return of the Writ, &c. C. B. Of the Arrest, and Bail to the Sheriff,	7 10 14 15 24 25 26 27 30
	DF

Df Common Bail.

	age	;
Of common Bail or Appearance, B. R.	32	
Of common Bail or Appearance, C. B.	33	A COLUMN
Df Special Bail.		
Of the Affidavit to hold to Bail,	42	
Of the supplemental Affidavit to hold to Bail,	46	
In what Cases required,	47	
Where a Defendant may be held to special Bail in a second Action for the same Cause pending	4/	
the first,	50	
Where a Defendant cannot be held to special Bail		
though the Debt is 10 l. and upwards,	52	
Before whom to be put in in Town, B. R.	54	
Before whom to be put in in Town, C. B.	55	
Before whom to be put in in the Country, in		
what manner, and when, to be transmitted,	60	
When to be put in, and if taken, when filed, B.R.	62	
When to be put in, and if taken, when filed, C. B.	63	
Of excepting to Bail, and who cannot become		
Bail, B. R	64	
Of excepting to Bail, and who cannot become		
Bail, C. B	65	
Of justifying, adding, and perfecting Bail, B. R.	68	
Of justifying, adding, and perfecting Bail, C. B.	69	
Of furrendering in discharge of Bail,	74	
Of proceeding on the Bail-Bond,	79	
Of staying Proceedings on the Bail-Bond,	81	
Of proceeding against the Sheriff, to compel a		
Justification of Bail, &c.	85	
Of Summonses and Orders for Time to put in,		
add to, perfect, and justify Bail, &c.	89	

Of the Declaration.

N. C.	Page
When to be delivered or filed, and to whom, B. R.	. 92
When to be delivered or filed, and to whom, C.B	. 93
Of delivering Declarations de bene esse, B. R.	100
Of delivering declarations de bene esse, C. B.	101
Of the Rule to declare, B. R. Of the Rule to declare, C. B.	104
Of delivering Declarations by the by, or in chief,	105
B. R. Designations by the by on in chief	106
Of delivering Declarations, by the by, or in chief,	107
Of an Infant's declaring,	108
Of amending the Declaration, &c.	110
Of the Uenue.	
And herein of changing the Venue, -	116
Of Discontinuing.	
Of discontinuing after Declaration delivered, and	
Plea pleaded, or Demurrer, &c. and of staying	
Proceedings after Declaration delivered,	124
Of Ronproffing.	
Of nonproffing for not declaring,	126
Of Imparlance, B. R.	129
Df Imparlance, C. B.	130
	DE
	201.71

Df pleas in Abatement.

	Pag
When to be pleaded, B. R.	135
When to be pleaded, C. B. —	133
Of Pleas in Abatement requiring an Affidavit,	134
What Pleas in Abatement do not require an Affi	
davit, —	ibid
Of the Judgment upon a Plea in Abatement,	135
Of demanding Conulance,	137
Df demanding Dyer, B.R.	140
Df demanding Dycr, C.B.	141
Of Pleas in Bar.	
Of the general Issue, B. R.	146
Of the general Iffue, C. B.	147
Of paying Money into Court,	148
Of paying Money into Court, and in what Cases	
allowed, B. R.	150
Of paying Money into Court, and in what Cases	
allowed, C. B. Of the Plea of Tender,	151
Of a Sett-off,	156
Of an Infant's defending,	163
When Defendant ought to plead, B. R.	164
When Defendant ought to plead, C. B.	165
Of procuring longer Time to plead, and herein	- 3
of Summonfes and Orders, &c. —	167
Of withdrawing, waiving, adding, and amending	
Pleas, &c.	171
Of special Pleas, and herein of pleading double, &c.	175
	Of

Of the Replication.

Of replying, rejoining, &c. and joining Issue,	179
Of Demurrers.	
and the self-deployed to the self-self-self self-self-self-self-self-self-self-self-	Dage
And making up als D.	Page 180
And making up the Demurrer Book, B. R.	181
And making up the Demurrer Book, C. B.	184
And Judgment thereon, &c. B. R. And Judgment thereon, &c. C. B.	185
And Judgment thereon, &c. C. B.	105
Of Trial by Record,	187
Of pleading auter Action pendent,	188
Of pleading a former Recovery, —	190
Of pleading other Matters of Record,	194
	30.00
Of making up the Jaue, B.R.	200
Of making up the Islue, C. B.	201
Of making up the Issue by Bill -	207
Of making up the Issue by Original,	213
Of entering the Issue, B. R.	214
Of entering the Issue, C. B	215
Of Trial.	
Of the Nation of Taiel and Taiel by Burnife B I	2. 216
Of the Notice of Trial, and Trial by Proviso, B. F. Of the Notice of Trial, and Trial by Proviso, C. I.	210
Of the Countermand of Notice of Trial, B. R.	222
Of the Countermand of Notice of Trial, B. R. Of the Countermand of Notice of Trial, C. B.	223
Of putting off Trial,	224
Of granting a View,	226
or granting a view,	Of
	٠.

	Page
Of a Witness going abroad,	232
Of Trial by a special Jury, -	233
Of making up the Record for Trial, B. R.	235
Of making up the Record for Trial, C. B.	237
Of compelling the Attendance of Witnesses at the Trial, B. R.	e
Of compelling the Attendance of Witnesses a	248
the Trial, C. B.	
Of entering the Cause for Trial, B. R.	249
Of entering the Cause for Trial, C. B.	254
Of Trials at Bar,	255
Of Thais at Dai,	258
Of a Konpros,	260
Df a Nonsuit.	
Of Judgment as in Case of a Nonsuit, for no	
proceeding to Trial,	261
Of Nonfuiting at the Trial,	266
Of Nomuting at the Trial,	200
Of Arbitration.	
Of referring Confer to Arbitration and bonds	
Of referring Causes to Arbitration, and herein of Disobedience to the Award,	
of Dhobedience to the Award, . —	267
Of Merdias.	276
	-/-
And herein of the Postea and entering of Ver-	
dicts, &c, B. R. —	278
And herein of the Postea and entering of Ver-	, -
dicts, &c. C. B.	279
	-13

Of Judgments.

	Page
Of Judgments by Default, &c. and herein of the	
Writ of Enquiry,	281
Of the Writ of Enquiry, Notice thereof, and	
executing the Writ, &c. B. R	284
Of the Writ of Enquiry, Notice thereof, and	
executing the Writ. &c. C. B.	284
When to be figned, &c	291
When to be figned, and how to be entered, &c.	292
How to be entered, and with whom, B. R.	294
How to be entered, and with whom, C. B.	295
When regular, and where set aside, &c.	299
Of Judgment by Confession, &c. —	303
Of Judgment after the Death of a Party,	309
Of arrefting the Judgment,	313
Of new Trials,	318
Of docquetting the Judgment Ro	ills
and carrying in the Rolls, B.R.	324
The production of the contract	
Of docquetting the Judgment Ro	115
and carrying in the Rolls, C.B.	225
	,-,
DE demantion	
Of Execution,	30
When to be fued out, and by whom.	333
Where the Execution must be joint, and where	333
it may be feveral,	339
Where Execution may go,	341
Of executing the Writ,	343
How supersedeable,	347
	Of
	OI

	Page
Of the Teste and Return of the Writ,	350
What Writs of Execution must or need not be	
returned,	352
Where there may be a fecond Execution,	353
Of Outlawry upon Process of Execution,	355
Where there is a Lien for Rent upon goods	
taken in Execution	357
Of charging in Execution,	359
Of entering Satisfaction on the Roll,	360

THE END OF THE FIRST VOLUME.



